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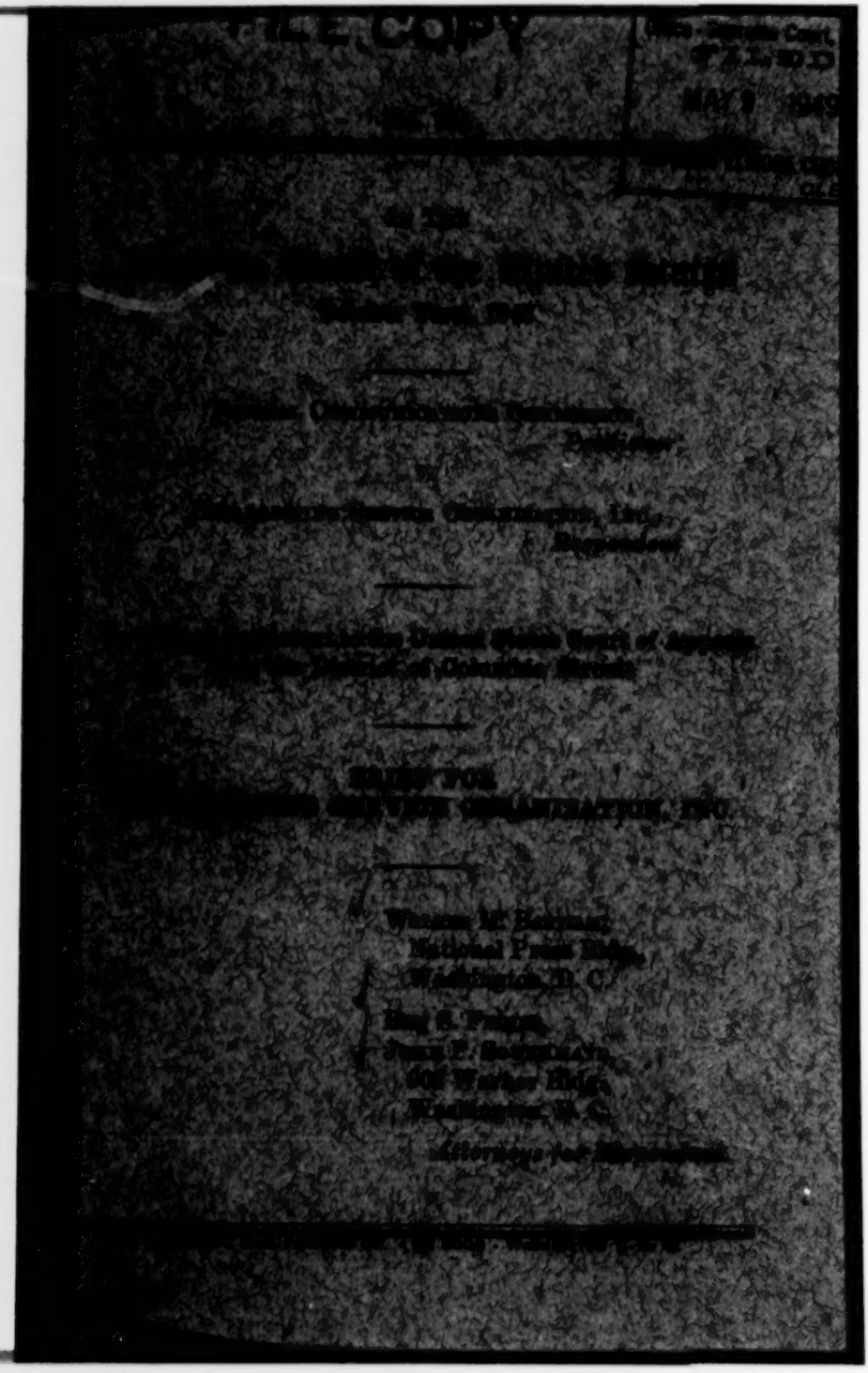

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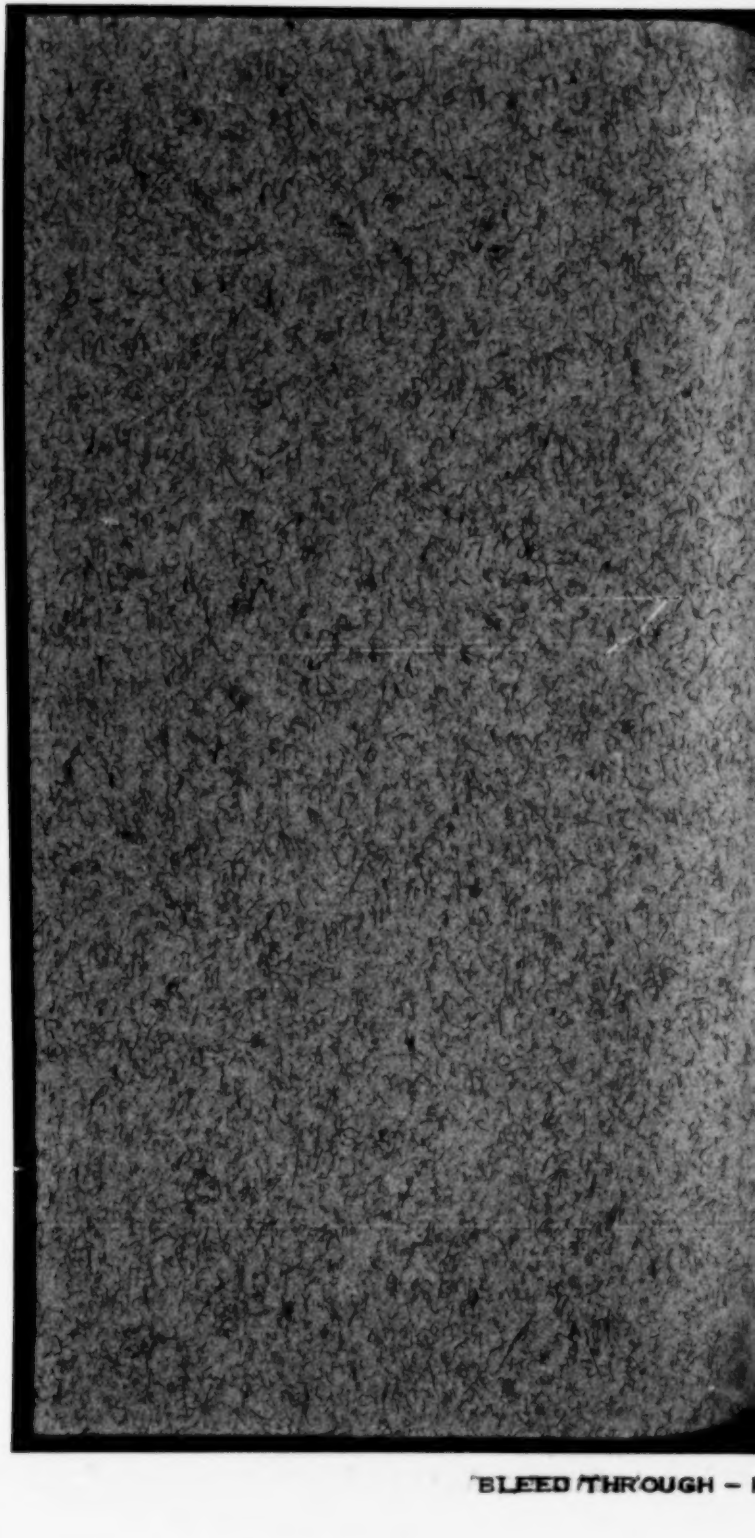

BLEED THROUGH –

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes and Rules Involved	2
Statement of Case	2
Present Organization of Respondent	3
The 1937 Agreements	4
Claims Made Against the Stock	7
Acts of Ownership	9
Reasons for Not Reporting the Acquisition	9
Unauthorized Purchase of Stock in the Name of Arde Bulova	10
Transfer of 60% of Voting Stock Reported in 1938	12
Purchases of Class A Non-Voting Stock	12
Purchase of Remaining Interest in B Stock	13
Final Settlement of Claims	14
Application for Construction Permit	15
Service Rendered by Station WORL	15
Proceedings Subsequent to Hearing	16
Summary of Argument	19
I—The court below properly held that it is arbitrary and capricious for the Commission to find and conclude that respondent engaged in misrepresentations and concealments, or submitted false reports and testimony, without substantial	

OOR COPY

PAGE

evidence to support such findings and conclusions and in the face of uncontradicted testimony by respondent that its actions were in good faith without intent to deceive. That respondent was governed by the considerations set forth in its testimony is supported by legal authority and by the fact no possible motive for concealment is established or bad faith shown 22

A. That Respondent or Its Principals Engaged in Misrepresentations and Concealments or Submitted False Reports and Testimony Is Not Supported by Substantial Evidence or by Legal Authority 23

1. The Respondent Acted in Good Faith 24

2. The corporation was entitled to consider Nordblom as the owner of the stock 27

3. The purchase of stock in the name of Bulova was not authorized or effective.. 28

B. Without Evidence of a Motive or a Purpose to Be Served, or an Affirmative Showing of Bad Faith, It Cannot Reasonably Be Concluded that Respondent Engaged in Misrepresentation and Deception or Furnished False Reports and Testimony 29

C. Since the Decision Is Not Supported by Substantial Evidence, It Was Properly Reversed and Remanded to the Commission by the Court Below 31

II—The court below correctly held that the April 21, 1947 decision erroneously cites F. C. C. v. WOKO, Inc. (329 U. S. 223), to support denial of the WORL renewal of license since the

BLEED THROUGH – POOR

PAGE

WOKO case is clearly distinguishable in fact and law. That the decision is arbitrary and capricious is manifest from the fact it is the sole instance where unintentional failure to report facts, with no intention to deceive, has resulted in denial of a renewal of license 35

III—The record does not support the conclusions of the Commission that Lafount and the Cohens jointly acquired control of appellant March 25, 1937 and have at all times since acted as partners in operating WORL. No conclusion is reached on the issue whether transfer of control occurred without Commission consent in violation of Section 310 (b) of the Act because the evidence shows no such violation in fact occurred and further shows that although on notice sinc 1938 that Lafount and Sanford Cohen together held 60% of appellant's stock, the Commission did nothing to require application for transfer of control to be filed. Public records show that the Commission Law Department recommended in 1941 that no action be taken against respondent for violation of Section 310 (b) notwithstanding the ownership by Lafount and Sanford Cohen of more than 50% of the voting stock, and also show that a renewal of license was subsequently granted WORL in 1942. Assuming that a violation of Section 310 (b) has occurred, the Commission in the past has consistently excused such violations when not committed in bad faith 43

IV—The Commission erred in denying the WORL renewal of license because respondent does not possess the necessary character qualifications of a broadcast licensee when the character of respondent was not in issue and notice of such

COPY

PAGE

issue and opportunity to introduce evidence thereon was not afforded respondent 49

V—The Commission violated its own rules, exceeded its statutory authority, and deprived respondent of its property without due process of law in denying a hearing on the joint application for transfer of control of respondent from its present stockholders to Bitner Broadcasting Company 54

VI—With the record barren of affirmative evidence of bad faith or intention to deceive, it was arbitrary and capricious for the Commission in its decision to ignore the evidence on the meritorious program service of WORL and to not weigh the extent to which respondent meets the statutory standard of service in the public interest, convenience or necessity 59

VII—Petitioner's brief is based upon the assumption, not justified by the record, that respondent engaged in a course of concealment and deception; that its actions were taken with a *reckless and wilful disregard* of its duties to the Commission; and therefore respondent does not possess the character to continue operating the station. The fact is that there is no evidence of concealment or misrepresentation, nor of intent to conceal or misrepresent, nor of recklessness or wilful disregard of its duties as a licensee. Those elements may not be established in the manner which petitioner attempts—by piling inference upon inference. The Commission decision is based only on the alleged concealments and deceptions of respondent, with no findings or conclusions as to reckless and wilful disregard of its duties as a licensee. Petitioner on appeal is therefore attempting to inject into the case a

BLEED THROUGH – POOR

PAGE

ground for denial of the renewal which is without support in the decision from which appeal is taken. The authorities and arguments set forth in petitioner's brief are not controlling or in point on the facts of record 61

Conclusion 71

Appendix A 72

Appendix B 83

Appendix C 90

Appendix D 93

TABLE OF CASES

American Eagle Fire Insurance Co., et al., v. Jordan, et al., 67 F. Supp. 76 (U. S. Dist. Ct.—D. C.) 58

Ashbacker Radio Corporation v. Federal Communications Commission, 326 U. S. 327 (1945) 56

B. & O. R. R. v. U. S., 264 U. S. 258 (1924) 58

Baltimore and Ohio Railroad Company v. U. S., 5 F. Supp. 929 (N. D. Ohio, 1933) 33

Barrows v. Fuller, et al., 253 Mass. 79; 148 N. E. 374 (1925) 25

Bassett v. Brown, 105 Mass. 551 (1870); cf. Fortier, et al. v. Monat, et al., 286 Mass. 335, 190 N. E. 530 (1934) 26

Bellows, et al. v. McKenzie, et al., 212 Mass. 601; 99 N. E. 470 (1912) 24

Boudrot v. Cole, et al., 285 Mass. 353; 189 N. E. 59 (1934); cf. St. Georges Church v. Primitive Methodist Church, et al., 315 Mass. 202, 52 N. E. (2d) 401 (1943) 29

OPY

PAGE

Brahy v. Federal Radio Commission, 59 Fed. (2d) 879; 61 App. D. C. (1932) 52

Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673 (1930) 58

Brogan, et al. v. Warran Wallace & Co., 235 App. Div. 388; 257 N. Y. Supp. 200 (1932) 25

Buffalo Broadcasting Corporation (Dockets 6324-6325) Federal Communications Commission 49

Caines v. Sawyer, et al., 248 Mass. 368; 143 N. E. 326 (1924) 25

Chicago Junction Case, 264 U. S. 258 (1924) 33

Chicago, M. & St. Paul Ry. Co. v. Polt, 232 U .S. 165 (1914) 58

Commissioner of Internal Revenue v. Skaggs, 122 Fed. 2721 (C. C. A. 5th, 1941) 53

Consolidated Edison Company v. National Labor Relations Board, 305 U. S. 197 (1938) 32, 52

Courier Post Publishing Company v. Federal Communications Commission, 104 F. (2d) 213; 70 App. D. C. 80 (1939) 32

Crowell v. Benson, 285 U. S. 22, 48 52

DeBlois, et al. v. Boylston & Tremont Corp., et al., 281 Mass. 498; 183 N. E. 823 (1933) 29

Fall River National Bank v. Estes, 279 Mass. 380; 181 N. E. 242 (1932) 28

Federal Communications Commission v. WOKO, Inc., 329 U. S. 223 ..... 19, 59

Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266 34

BLEED THROUGH – POO

PAGE

Frazier v. Simmons, et al., 139 Mass. 531; 2 N. E. 112 (1885) 25

Glen v. Garth, et al., 133 N. Y. 18; 30 N. E. 649 (1892) app. dis. 147 U. S. 360 (1893) 29

Harriet Cotton Mills v. Gulf, M. & N. Ry. Co., 223 I. C. C. 653 53

Heindel v. United States, 150 F. (2d) 493, 497 (C. C. A. 6th, 1945) 23

Hyland v. Hyland, 278 Mass. 112; 179 N. E. 612 (1932) 25

In re Air Waves, Inc. Docket 6155, March 20, 1946, 3 R. R. 142 38

In re Application of Charleston Broadcasting Company, Docket 6611 (decided November 26, 1947) Federal Communications Commission, 3 R. R. 1753 38

In re Application of Hiawathaland Broadcasting Company, Docket 6208 (decided September 12, 1945) Federal Communications Commission 60

In re Application of KFNF, Inc., Docket 5942 (decided September 19, 1945) Federal Communications Commission, 3 R. R. 52 37

In re Application of Lake Erie Broadcasting Company, Docket 7004 (decided June 28, 1947) Federal Communications Commission, 3 R. R. 1265 37

In re Douglas' Estate, 169 Misc. 425; 7 N. Y. S. (2d) 870 (1938) 26

In re Kanawha Valley Broadcasting Co., Docket 6558, Federal Communications Commission, September 10, 1948, 3 R .R. 1977 40

COPY

PAGE

In re Powel Crosley, Jr., Transferor and The Aviation Corporation, Transferee, Docket 6767, decided by F. C. C. December 6, 1945, 3 R. R-6, 17 30

I. C. C. v. Louisville & Nashville R. R. Co., 227 U. S. 88, (1913) 58

In the Matter of Cities Service Power and Light Co., S. E. C. Holding Company Act, Release #4551 53

In the Matter of Frank R. Moll, et al., Securities and Exchange Act of 1934, Release #3600 53

In re Midland National Life Insurance Co., Docket 8052, Proposed Decision, Federal Communications Commission, February 21, 1949, 4 R. R. 1269, 1292 40

In re revocation of permit of Station WTVJ, Dockets 9149, 9114, February 4, 1949, 4 R. R. 1089 42

Kidder v. Greenman, et al., 283 Mass. 601; 187 N. E. 42 (1933) 29

Lane v. Volunteer Co-Operative Bank, Boston, 307 Mass. 508, 512; 30 N. E. (2d) 821 (1940) 28

Lawrence v. Fox, 20 New York 268, 274 27

Leach v. Carlisle, 258 U. S. 138, 140 33

Levovsky v. Horvitz, 307 Mass. 475; 30 N. E. (2d) 411 (1940) 27

Mason v. Moore, 76 N. E. 932, 936; 73 Ohio Stats. 275.... 23

James F. Monaghan, Inc. v. M. Lowenstein & Sons, Inc., 290 Mass. 331; 195 N. E. 101 (1935) 29

Morgan v. U. S., 298 U. S. 468 58

Moulor v. American Life Insurance Company, 111 U. S. 335, 345 (1884) 23

Murray v. Indursky, 266 Mass. 220, 223; 165 N. E. 91 (1929) 25

BLEED THROUGH – PO

PAGE

McKinley v. Warren, 218 Mass. 310; 105 N. E. 990 (1914) 26

McNulty v. Whitney, et al., 273 Mass. 494; 174 N. E. 121 (1930) 26

National Labor Relations Board v. A. S. Abell Company, 97 F. (2d) 951 32

National Labor Relations Board v. Columbian Enameling and Stampany Company, Inc., 306 U. S. 292, 300 (1939) 32

National Labor Relations Board v. Link Belt Co., 311 U. S. 584 70

N. L. R. B. v. Mackay Radio and Telegraph Co., 304 U. S. 333, 350 (1938) 52

National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, 271 (1938) 32, 71

National Labor Relations Board v. Sheboygan Chair Company, 125 F. (2d) 436 (C. C. A. 7th, 1942) 33

R. A. Jones and Co., Inc., v. Green Bros., 289 Mass. 50; 193 N. E. 582 (1935) 26

Republic Aviation Corporation v. N. L. R. B., 121 F. 2d 658 70

Richards v. Wells Fargo Express Co., et al., 156 App. Div. 268; 141 N. Y. Supp. 306 (1913) 25

Ryder & Brown Co. v. E. Lissberger Co., 300 Mass. 438; 15 N. E. (2d) 441 (1938) 25

Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F. 2d 552, cert. den., 305 U. S. 613.. 34

Schapiro, et al. v. Tweedie Footwear Corporation, 131 F. (2d) 876, 878 (C. C. A. 3rd, 1942) 23

R COPY

PAGE

Schildkraut v. Light, et al., 56 N. Y. S. (2d) 758, 761, rev'd on other grounds 269 App. Div. 990; 58 N. Y. S. (2d) 324 (1945) 25

S. E. C. v. Chenery Corp., 318 U. S. 80, 94 34

St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38 (1936) 58

Stuart, et al. v. Sargent, 283 Mass. 536; 186 N. E. 349 (1933) 28

Titus v. Wallick, 222 App. Div. 17; 225 N. Y. Supp. 263 (1927) 25

Waddle v. Cabana, 220 N. Y. 18; 114 N. E. 1054 (1917) 26

West Ohio Gas Company v. Public Utilities Commission, 294 U. S. 63 (1935) 52, 58

STATUTES CITED

Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1000) ..... 2, 19 and Appendix A

Administrative Procedure Act, Section 5(a) 51

Administrattive Procedure Act (60 Stat. 243) (U. S. C. 1009 (e)) Section 10 31

Communications Act of 1934, as Amended (48 Stat. 1064, 47 U. S. C. 151) .....Appendix A

Communications Act of 1934, as Amended, Sections 308(b), 310(a), 311 and 313 ..... 30 and Appendix A

Communications Act of 1934, as Amended, Section 309(a) 18

Communications Act of 1934, as Amended, Section 310(b) 20

Communications Act of 1934, as Amended, Section 402(e) 31, 34

BLEED THROUGH – POO

PAGE

Communications Act of 1934, as Amended, Section 405 17

Massachusetts General Law, Chapter 155, Sections 29 and 44 28

Massachusetts General Law, Chapter 64, Section 8.... 25, 26

Radio Act of 1927 (44 Stat. 1162, 47 U. S. C. 81) Appendix A

FEDERAL RULES AND REGULATIONS

Rules and Regulations of Federal Communications Commission — Sections 1.321(a) - (d) inclusive; 1.390(b) and (e) and Section 1.803 (formerly 1.196) ..... 30, 51, 55, 56 Appendix A

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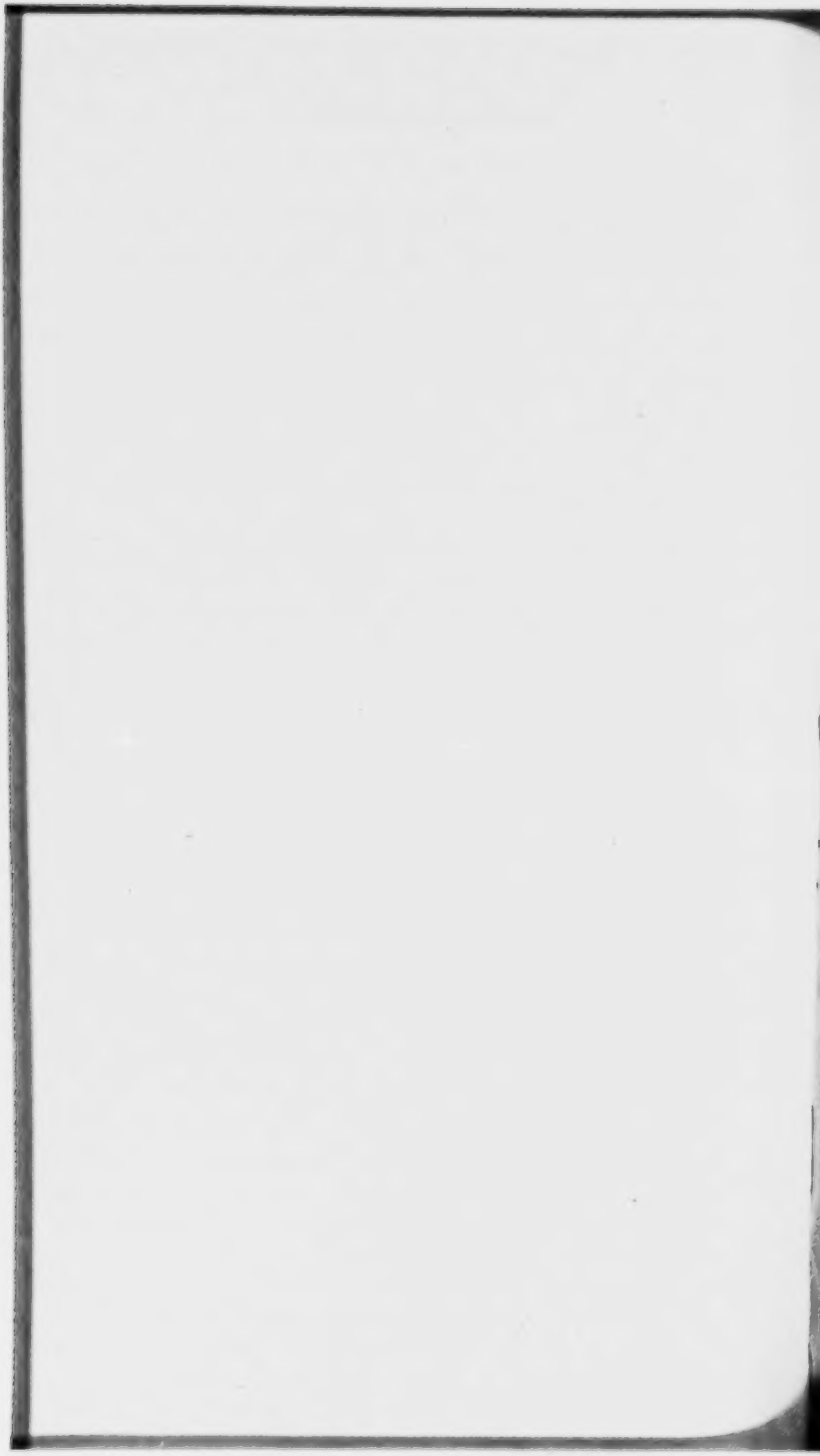

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IN THE

Supreme Court of the United States

October Term, 1948

No. 584

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

BROADCASTING SERVICE ORGANIZATION, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF FOR BROADCASTING SERVICE ORGANIZATION, INC.

OPINIONS BELOW

The Decision and Order of the Federal Communications Commission (R. 539-568, 600-601) have not yet been reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 608-620) has not yet been reported.

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JURISDICTION

The judgment of the Court of Appeals was entered on November 24, 1948 (R. 620-621). Certiorari was requested by the government on February 28, 1949, and was granted on April 18, 1949 in an order transferring the case to the summary docket (R. 623). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court below erred in holding that, as a matter of law, the Federal Communications Commission is not empowered by the provisions of the Communications Act of 1934, as amended, and the Decision of this Court in the *WOKO* case (329 U. S. 223) to deny the application for renewal of license of Station WORL on the ground that respondent does not possess the character to be entrusted with the responsibilities of a licensee, there being no substantial evidence to support the findings and conclusions of the Commission with respect thereto.

STATUTE AND RULES INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq*, the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1000) and the Rules and Regulations of the Federal Communications Commission are set forth in appendix A to this brief.

STATEMENT OF CASE

Broadcasting Service Organization, Inc. has been the licensee of Station WORL, which operates in Boston, Massachusetts on 950kc., with 1 KW, daytime only, since November 20, 1931. That it has been and is rendering a

BLEED THROUGH – POOR

meritorious program service in the public interest, convience or necessity is established by the record and not questioned by the Commission (R. 288-296).

On May 27, 1944, respondent filed an application pursuant to Section 308 (a) of The Communications Act of 1934, as amended, for renewal of its station license. On June 13, 1944, this application was designated for hearing.* Hearings were held September 22 and 23, October 18, and December 5, 1944, in Washington, D. C., and on November 20, 1944, in New York, N. Y., before P. W. Seward, Esq., the presiding officer designated by the Commission. The hearing record contains the facts hereinafter set forth, which are uncontroverted except where it is expressly stated that the testimony is conflicting.

Present Organization of Respondent

Broadcasting Service Organization, Inc., is a Massachusetts corporation with outstanding capital stock consisting of 1000 shares of non-voting Class A preferred and 1000

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* The hearing issues were:

1. To determine who are the present owners of the stock of the applicant corporation, and when and from whom said stock was acquired.
2. To determine whether the license granted to the applicant corporation, or the rights or responsibilities incident thereto, have been in any manner, either directly or indirectly, transferred, assigned, or disposed of without the consent of the Commission, as provided by the Communications Act of 1934, as amended, and particularly Section 310(b) thereof.
3. To determine whether the statements and representations made in the various applications, documents, and reports filed with the Commission on behalf of the applicant, by its officers, directors, and/or agents, have fully and accurately reflected the facts concerning the ownership and distribution of the stock of the company.
4. To determine whether the applicant's officers, directors, stockholders, and/or agents, or either of them, have made false statements and representations to the Commission as to the ownership, transfer, and/or control of the stock of the applicant.
5. To determine whether all contracts and agreements which have been entered into by applicant's officers, directors, stockholders and/or agents, relative to the sale and transfer of the stock of the applicant corporation, have been reported to the Commission as required by Section 43.1 of the Rules and Regulations.
6. To determine whether in view of the facts adduced under the foregoing issues, public interest, convenience, or necessity would be served by granting the instant application.

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shares of voting common designated as Class B. Since November 1943 the officers, directors and stockholders have been:

Name	Office	A Stock	B Stock (Voting)
Harold A. Lafount	Director-President	1000	400
Sanford H. Cohen	Director	—	400
George Cohen	Treasurer	—	200
Robert E. Davison	Director-Clerk (Secretary)	—	—

(R. 235, 355, 391)

All are citizens of the United States and possess the qualifications required of officers, directors, and stockholders of a licensee corporation. In 1927, after a successful business career, Harold A. Lafount was appointed a member of the Federal Radio Commission. He left the Commission in 1934 and since then has been employed as General Manager of all the radio interests of Mr. Arde Bulova (R. 21-23, 305). Sanford H. Cohen, a former Assistant United States Attorney, and George Cohen are brothers who have been associated in the practice of law in New York City since 1920. They have served as legal counsel to Mr. Bulova and to the Bulova Watch Company for about twenty-five years. Robert H. Davison of Boston is an attorney-at-law of highest reputation (R. 26, 27, 83, 225-27, 279, 305-6).

The 1937 Agreements

Prior to March 25, 1937 the stock of Broadcasting Service Organization, Inc. was distributed as follows:

Name	A Stock	B Stock
George A. Crockwell	400	200
James K. Phelan	300	150
William H. Eynon	300	150
Robert C. Nordblom	—	500*

(R. 354, 386)

* Mr. Nordblom acquired his 500 shares of B stock on July 29, 1936 and became President and Director of the corporation at that time (R.

BLEED THROUGH – POOR

At that time Station WORL had been steadily losing money. The stockholders therefore decided that a sale of the stock was essential in order to provide new funds for the corporation (R. 62, 322). About March 1, 1937 George A. Crockwell telephoned Harold A. Lafount with reference to the possible sale of stock in the corporation (R. 24, 54). Lafount discussed the proposal with Arde Bulova. Mr. Bulova was not interested in obtaining an interest in WORL but had no objection to Lafount and the Cohens making such a move. Lafount thereupon proceeded to negotiate with Crockwell on his own behalf. An understanding was reached between them when Lafount agreed to purchase 400 shares of Class B stock for $48,000. Crockwell subsequently advised Lafount that an additional 300 shares of voting stock had become available. When Lafount told the Cohens of the possibility of their acquiring this stock, they authorized Lafount to negotiate on their behalf (R. 26, 58, 63, 83, 227-8, 245, 278-280, 309-10).

On March 16, 1937 an agreement was signed by Crockwell, Nordblom, Phelan and Eynon. Following a recital that Crockwell and Nordblom were about to enter into a contract with Lafount for the sale of 700 shares of B stock for $52,500, Eynon and Phelan each agreed to sell Crockwell 150 shares of B stock and 300 shares of A stock for a total consideration of $2,500 apiece. Crockwell and Nordblom agreed to apply the $52,500 to the discharge of this $5,000 and of all corporate obligations (except certain obligations as specified in the agreement with Lafount) and distribute the balance then remaining 62½% to Crockwell and 37½% to Nordblom. Crockwell, Eynon, and Phelan agreed to resign as officers, directors and employees of the corporation (R. 382). Lafount had nothing to do with this agreement and was not even aware of its existence (R. 57-8, 67, 71).

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322). 200 of these 500 shares were purchased from Crockwell (R. 330). Early in August 1936 the licensee reported to the Commission Mr. Nordblom's acquisition of a 50% interest in the Class B voting stock. The Commission did not require that an application be filed for transfer of control of the corporation to Nordblom (R. 354, 391).

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On the same day, March 16, 1937, Crockwell, Nordblom, and Lafount entered into an agreement providing for the transfer of 400 shares of B stock (300 to be supplied by Crockwell and 100 by Nordblom) to Lafount for a consideration of $48,000. Crockwell and Nordblom undertook to pay all the debts of the corporation existing on March 25, 1937 (with certain exceptions) from the proceeds of the sale, to reduce the liquidating value and the annual dividends of the preferred stock, and to cause certain changes in the by-laws of the corporation. The closing was set for March 25, 1937 (R. 385).

On March 25, Crockwell, Nordblom, Phelan, Eynon, Lafount, and Ben S. Fisher, attorney for Lafount and the Cohens, met at the office of Robert H. Davison, attorney for the licensee and its stockholders. An escrow agreement was entered into between Crockwell, Nordblom, Lafount, and Davison providing that $48,000 was to be paid to Davison as escrow agent to pay off the debts of the corporation, the balance to be distributed 62½% to Crockwell and 37½% to Nordblom (R. 74, 75, 80, 81, 393). The Cohens not being present at the closing, Ben S. Fisher, as Agent, entered into an agreement with Nordblom whereby he agreed to purchase 300 shares of Class B stock for $4,500 (R. 396). A cashier's check in the amount of $52,500 was delivered by Lafount to Davison in payment for the 400 shares purchased by Lafount and the 300 shares purchased by the Cohens (R. 82-83). Temporary certificates were issued, one to Lafount for 400 shares and one to Nordblom for 300 shares. The latter was endorsed by Nordblom in blank and delivered to Lafount. The temporary certificate for 300 shares was issued in Nordblom's name because Lafount did not know at that time how the Cohens wanted their 300 shares apportioned between them (R. 106, 109, 115, 116). No arrangement was made at the closing as to how the permanent certificates were to be issued (R. 104). Though all the agreements were closed simultaneously, Lafount at all

BLEED THROUGH – POOR

times considered his purchase of the 400 shares and the Cohens' purchase of 300 shares as separate transactions. They were two distinct purchases negotiated separately and based on separate contracts (R. 62-3, 76, 77, 83, 120, 172-3, 333).

Lafount's acquisition of 400 shares of Class B stock was reported to the Commission on March 31, 1937 (R. 399). Of the $48,000 Lafount paid for his 400 shares of B stock, $38,000 was used to pay off the existing debts of the corporation. The Cohens had agreed with Lafount that they would pay their share of the debts and that the cost of the 700 shares should be divided on a per share basis to equalize the purchase price, Lafount's cost being $30,000 and the Cohens' $22,500 (J. App. 27, 76, 150, 151, 228, 243). For this reason the "Amount Actually Paid for Stock" by Lafount was reported as $30,000 (R. 112, 399). The consideration for the 600 shares of Class A stock acquired by Crockwell was reported as $26,400, the par value of $44 per share. The report of March 31, 1937 was prepared by Davison, Crockwell's attorney. At the time it was filed Lafount had no detailed knowledge of the arrangements among Crockwell, Nordblom, Eynon, and Phelan for the settlement of the value of the A stock among themselves (R. 56, 66, 74, 399).

Claims Made Against the Stock

Shortly after the closing date Crockwell started complaining to Lafount about the deal. He called frequently on Lafount, telling him that he wished to get the station back. He stated that Nordblom was dissatisfied too and something had to be done about it (R. 30 - 31, 103, 117, 155-157). Crockwell discussed his dissatisfaction with Nordblom and with many others. The subject was also considered at a number of directors' meetings (R. 332-333, 335-336, 339, 340). Though Crockwell was telling Lafount that Nordblom was dissatisfied, the latter never

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made any complaints or claims and testified that he never was dissatisfied with the transaction (R. 110, 327). The evidence is conflicting as to whether Nordblom ever expressed any dissatisfaction to Lafount. However, there is no question that Crockwell led Lafount to believe that both he and Nordblom were very displeased with the whole deal. Furthermore, it is clear that shortly after the March 1937 closing a dispute had arisen between Crockwell and Nordblom which continued over a considerable period of time (R. 110, 117-118, 155-158, 362). As all the negotiations leading up to the March 25, 1937 closing had been conducted with Crockwell, and as he had made all the complaints, Lafount attempted to straighten things out with him rather than with Nordblom whom he hardly knew (R. 30-31, 57-58, 117).

These complaints were received before Lafount had ascertained how the Cohens wished to have their 300 shares divided. When Lafount advised the Cohens of Crockwell's complaints, *they refused to permit the permanent certificates for the 300 shares to be issued in their names until all dissatisfaction had been ironed out and no further claims against the stock were outstanding* (R. 34-35, 109, 121, 143, 175-176, 228-229, 250). Pending the settlement of the differences a permanent certificate was issued in the same form as the temporary one. Nordblom endorsed it in blank, and on April 30, 1937 it was sent to Lafount. Nordblom testified that he did not recall why he permitted the stock to remain in his name but believed it was a matter of convenience to the buyers. He was glad, however, to remain a voting stockholder with 400 shares because the station was a tenant of the hotel he ran and it was good business for him to watch its progress (R. 32, 340, 342).

Early in 1939, before any settlement had been reached with Crockwell, both Davison and Crockwell advised Lafount that a Miss Natalie Whitwell claimed to own all

BLEED THROUGH – PO

the stock of the corporation (R. 31, 176, 222, 252, 333, 339-340, 359-360). On July 21, 1941 Hines, counsel for Miss Whitwell, wrote Lafount demanding that all the outstanding stock of the corporation be turned over to his client (R. 261-262, 361). In January 1942 Miss Whitwell brought a suit at law against the corporation in Massachusetts. The court held for the defendants (R. 31, 177-178, 229-230, 261-263). Hines wrote the Commission a series of letters beginning in June 1939 and ending in September 1941 in which he advised the F. C. C. of the Whitwell claims and complained about the ownership of WORL. As late as December 15, 1943, Hines, in testimony before a Congressional Committee, asserted claims against the corporation on behalf of Miss Whitwell (Hearings Before Select Committee to Investigate F. C. C., Volume 39, pp. 5017-29, 78th Congress, December 15, 1943; R. 254).

Acts of Ownership

The permanent stock certificate for 300 shares, endorsed in blank by Nordblom, was turned over to Sanford H. Cohen by Lafount immediately upon its receipt and remained in the Cohens' possession thereafter (R. 30, 121, 228, 280). The Cohens could have sold the stock or had it put in their name because the certificate was negotiable (R. 248, 250). However, the Cohens never voted the 300 shares of B stock. While it stood in Nordblom's name they never attended directors' meetings or stockholders' meetings. No dividends were ever paid on the stock (R. 263). Nordblom voted the stock at all times. In fact, he voted 400 shares of B stock at ten stockholders' and directors' meetings from March 5, 1937 up to and including April 16, 1943. There existed no arrangement or understanding governing the stock or the manner in which it should be voted (R. 123-126, 219, 265, 329, 335, 342, 364-373).

Reasons for Not Reporting the Acquisition

Thus the B stock continued to be owned of record, 400 shares by Lafount, 400 by Nordblom, and 200 by Crock-

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well (R. 33). Both Lafount and the Cohens believed that as there had been no transfer on the books of the corporation, and as Nordblom remained the record holder of the 300 shares, it was proper for the applicant to report Nordblom as the holder of the stock. They did not think that the status of the stock had changed in any way as the certificates were still in Nordblom's name. They felt that any transfer to their names would be unwise at that time for they might wish to rescind the sale and ask for the return of their money. *In their minds the sale remained unconsummated and the deal had not been closed.* The evidence is clear that if the principals made a mistake of judgment, they did not make it in bad faith. (R. 34, 112, 115-116, 117, 120, 223, 143, 175-176, 228-229, 250-252, 254, 280, 284). *Similarly, Lafount and the Cohens believed that in view of the circumstances and the uncertainty concerning the final transfer of the 300 shares of B stock to the Cohens it was unnecessary under Section 310(b) of the Act to apply for a transfer of control of the corporation. They did not think there had been a transfer of control within the meaning of the law* (R. 119, 120, 173-174, 254-255). Sanford Cohen was not admitted to practice before the Commission in 1937—his admission occurred in 1940. Commission records show that George Cohen has never been admitted to practice before the Commission. There is no evidence indicating that in 1937 either of the Cohens was familiar with the Rules and Regulations of the Commission. It is fair to infer—as was in fact the case—that in failing to report the transfer the Cohens were relying upon the advice of the attorneys handling the deal—Ben S. Fisher (radio attorney) and Robert H. Davison (R. 236-237).

Unauthorized Purchase of Stock in the Name of Arde Bulova

On July 12, 1937 at Lafount's request Arde Bulova loaned Crockwell $5,000 on a six months' note under-

BLEED THROUGH – POO

written by Lafount and received 200 shares of B stock as security. Six months after the note fell due Bulova foreclosed, and the 200 shares of B stock were sold at auction for $100. In July 1938 Sanford Cohen left on a vacation. Knowing a sale was going to be held, he told Lafount that he would buy the stock. Lafount instructed Davison to purchase the stock for Sanford Cohen. Because of some legal technicality which Davison thought would delay the transfer if the stock were sold to one other than the pledgee, Davison purchased the stock in Bulova's name on July 28, 1938. When Sanford Cohen returned from California in September, he found the stock had been bought in Bulova's name. The cleanest way to clear title was to have Bulova make a simple assignment of the stock to Cohen so as to show the actual facts. Lafount had advanced the $100 for the purchase and was repaid by Sanford Cohen. Cohen was at all times the owner of the stock (R. 35-36, 137-139, 230-231, 267-270, 402). The purchase in Bulova's name was a mistake on the part of Davison; Bulova was greatly annoyed when he discovered that the stock had been bought in his name, because he was not the purchaser and was not interested in the station. Bulova never considered that he had an investment in WORL (R. 203-204, 317, 319-320). This transfer of 200 shares of B stock from Crockwell to Sanford Cohen for a consideration of $100 was reported to the Commission on November 22, 1938. The date of acquisition was given as September 30, 1938, the date when it was assigned by Bulova and issued in Cohen's name (R. 141-142, 204-205, 357, 436).

At the time the report was made out Cohen had paid only $100 for the stock. The $100 was credited to Crockwell. After the assignment, Cohen advised Bulova that he would attempt to collect the deficiency from Crockwell and that if he did not succeed he would make good to Bulova. No payment was made to Bulova until it became evident that there was no chance to collect from Crock-

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well. Then Cohen paid Bulova $5,000, the amount of the debt. However, at the time the report was made to the Commission, $100 reflected the actual consideration paid. Sanford Cohen testified that the failure to report the $5,000 might have been an error in judgment but the report had been made in good faith (R. 231-232, 268, 270, 319-320). In fact, the report accurately stated the situation.

Transfer of 60% of Voting Stock Reported in 1938

In the report filed with the Commission on November 22, 1938, Harold Lafount was shown as the owner of 400 shares of Class B voting stock, Sanford Cohen the owner of 200 shares, and Robert Nordblom the owner of the remaining 400,—thus indicating that Lafount and Cohen together owned 60% of the voting stock. The Commission did not require that an application for transfer of control of the corporation be filed (R. 207, 232, 255, 354, 391).

Purchases of Class A Non-Voting Stock

In March 1939, on the advice of Davison, Lafount bought 900 shares of Class A non-voting preferred stock at auction for $2,450. Through oversight this acquisition was not reported to the Commission until about a year later. Lafount was under the impression that the acquisition had been reported immediately but later found out that it had not. He was shocked when he discovered the omission (R. 37-38, 98-99, 210-212).

In September 1940, Lafount purchased the remaining 100 shares of A stock from one Endlar for $3,100. This purchase was not reported until April 1941, again through oversight, Lafount being under the impression that it had been reported immediately. The purchase price of the stock was reported as $3,500, which included $400 legal fees incurred in connection with the purchase (R. 38-39, 208). Lafount's present ownership of all the A stock has been

BLEED THROUGH – POOR CO

a matter of record with the Commission since April 1941 (R. 354, 391).*

Purchase of Remaining Interest in B Stock

In September 1940, besides purchasing Endlar's remaining 100 shares of A stock, Lafount purchased Nordblom's remaining 100 shares of B stock for $1,500. This stock was acquired because there existed a possibility that the corporation would be sold to new interests and in order to do so it was necessary to have possession of all the outstanding stock (R. 140-141). The 100 shares of B stock were purchased from Nordblom for George Cohen at the latter's request. The stock was endorsed in blank by Nordblom and given to George Cohen. The $1,500 paid by Lafount was repaid him almost immediately (R. 245, 280, 285). Shortly after the sale Nordblom expressed dissatisfaction with the deal and stated that he did not want it to go through. He was dissatisfied as to the price and because he understood that the station was to be sold and no sale had taken place. Again George Cohen refused to permit the transfer of the stock to his name and Nordblom remained the holder of record. For this reason the transfer was not reported (R. 144, 160-161, 280, 285, 336, 391, 403-404). Nordblom continued to vote the 100 shares as well as the 300 involved in the 1937 transaction. He continued to take an interest in the corporation, discussed its problems, and attended its meetings. He was glad to remain a stockholder because the station was a tenant of the hotel he ran and it was good

* Petitioner's brief states that this 100 shares of Class A stock was transferred from Crockwell to Endlar on June 29, 1938, and that no report of the name of the transferor, the date of the transfer, or consideration paid was filed. The fact is that the Endlar ownership of the 100 shares was reported to the Commission on form 728 July 14, 1938, less than one month after his acquisition of the stock (R. 355). Nothing of record shows that respondent had knowledge of the consideration paid Crockwell by Endlar for these shares. The prompt filing of a report concerning the change in ownership clearly negatives the petitioner's suggestion of concealment or inordinate delay.

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business for him to watch the progress of the station. He was also glad to remain because he was dissatisfied with the sale (R. 335, 340, 342).

Final Settlement of Claims

The final settlement occurred in November, 1943, when Lafount, after consultation with Sanford Cohen, paid Nordblom $750 and received a receipt and general release from

> "all claims . . . not only on account of the purchase of 100 shares of the Class B stock of Broadcasting Service Organization, Inc., but from all other claims arising out of your purchase from me of both Class A and Class B common shares. . . ."

The $750 was paid by the Cohens but the release ran to Lafount because he had handled all the negotiations (R. 33-34, 172-173, 350). Though letters written by Nordblom and Davison prior to the execution of the release refer to the $750 as being "in full payment for 100 shares", Lafount and Cohen testified that the $750 was to clear up all claims against the 400 shares of B stock (R. 33-34, 280-281, 406). This is supported by the receipt and general release signed by Nordblom referred to above.

The 400 shares of B stock were owned of record by Nordblom until the final settlement of $750 was paid him in November 1943 in final adjustment of all claims (R. 33, 165-166, 281). By this time the Whitwell and other claims had also cleared up. On November 9, 1943 the 100 shares were issued to George Cohen. This was reported on November 15, 1943 (R. 36-37, 146, 439). On November 27, 1943 the remaining 300 shares of B stock standing in Nordblom's name were transferred, 200 shares to Sanford Cohen and 100 shares to George Cohen and a report of this was was filed with the Commission on December 2, 1943. Though $4,500 had been specified as the contract price, $5,000 was reported as the consideration. This was the actual cost to the Cohens at the time the report was

BLEED THROUGH – POOR

made after the various adjustments (R. 34-35, 146, 215-216, 354, 357, 391, 440).

Application for Construction Permit

In 1937 the licensee filed an application for full time operation of WORL. The application was denied solely on technical grounds of objectionable interference during night time hours. In connection with this proceeding Lafount submitted a balance sheet of the licensee as of April 30, 1937 listing "Cash in Banks $25,362.11." At that time the actual cash in the corporation's bank account was $362.11. Lafount explained that the stockholders actually had the cash available and if the permit had been granted they would have placed the $25,000 in the Corporation's account. Zinneman, respondent's accountant, who was called as a witness for and on behalf of the Commission, testified that the balance sheet was a proposed balance sheet and it should have been so designated. He testified that "the balance sheet should have been headed up pro forma balance sheet or proposed balance sheet, and if permission had been given by the F. C. C. for whatever purpose that money would have been used for, that money would have been put up" (R. 303). Lafount considered it extremely unfortunate that the accountant who prepared the statement had not included the $25,000 as a liability. He had not intended to infer that the cash stood to the actual credit of the corporation (Docket 4206, 7 F. C. C. Reports 242, 246; R. 298-299, 303, 345-348, 401).

Service Rendered by Station WORL

When Lafount became President of Broadcasting Service Organization, Inc., in March 1937, the corporation was in bad shape financially. The debts paid off at the closing amounted to $38,000. The station as a whole, including programming, equipment, and accounts receivable, was in very bad shape. As soon as Lafount became President a new station manager was hired. Together they succeeded

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in putting the station on its feet and in furnishing the public with good service. In 1938 the station showed a loss of $11,424 on total receipts of $54,754. In 1943 there was a profit of $25,101 with receipts amounting to $240,468. The Hooper rating rose progressively, putting WORL in a tie for first place during the daytime hours among Boston listeners. All profits were spent to build up the station. Time was regularly donated to at least seventy outstanding national or local organizations as well as to numerous governmental agencies; and the station received the McNinch Award for its outstanding weekly public service programs (R. 351, 353, 374-381, 41, 43-4, 135, 288-296).

Proceedings Subsequent to Hearing

On October 24, 1945 the Commission adopted a Proposed Decision denying the WORL renewal application. The Proposed Decision held that a transfer of control of respondent had occurred March 25, 1937 without Commission consent, as required by Section 310 of The Communications Act and the Rules adopted pursuant thereto, and also found that respondent had submitted false reports and testimony to the Commission concerning this transfer of control and other matters. The Proposed Decision concluded that the WORL renewal application should be denied because respondent could not be entrusted with the responsibilities of a licensee (R. 475-502).

On November 26, 1945, respondent filed Exceptions to the Proposed Decision accompanied by a Memorandum Brief (R. 503-538). On January 24, 1946, the Commission heard oral argument on its Proposed Decision.

On August 26, 1946, respondent and Bitner Broadcasting Company a corporation having no present broadcast interests or connection with respondent, filed joint application requesting Commission consent under Section 310(b) of The Communications Act for transfer of control of respondent from its present stockholders to Bitner

BLEED THROUGH – POOR

Broadcasting Company for a total consideration of $200,000. Pursuant to the requirements of Section 1.321 of the Commission's Rules, notice of this application for transfer of control was given by respondent twice a week for three weeks in the Boston Daily Globe from August 28 to September 14, 1946 and simultaneous publication of notice of the proposed transfer was given by the Commission in the Federal Register (R. 606-607).

At no time during the sixty day period provided by Section 1.321 of the Rules or at any time thereafter was any application filed with the Commission by any person or group desiring to acquire the outstanding stock of respondent on the same terms and conditions as set forth in the sale agreement with Bitner Broadcasting Company filed with the application for transfer of control.

On April 23, 1947, the Commission released its Decision adopted April 21, 1947, denying the application for renewal of license of Station WORL and dismissing as moot the pending application for transfer of control of respondent from its present stockholders to Bitner Broadcasting Company. The Decision was by a vote of 3 to 1 with the remaining 3 of the 7 members of the Commission not participating therein. A dissenting opinion was simultaneously issued by E. K. Jett, Commissioner. The dissenting opinion points out that on its facts this case differs from that in *WOKO, Inc.* v. *Federal Communications Commission* (329 U. S. 223), and concludes that since the parties are not guilty of having made false statements and concealments designed to mislead the Commission, the pending applications for renewal of license and for transfer of control of respondent should be granted (R. 565-568).

On May 13, 1947, respondent filed a petition for rehearing pursuant to Section 405 of The Communications Act. In addition to the points raised on appeal, the petition for rehearing alleged that since only 4 out of 7 Commis-

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sioners participated in the April 21, 1947 Decision and since 1 of the 3 Commissioners voting for denial had not participated in the oral argument on the Proposed Decision, leaving less than a quorum of the members of the Commission hearing oral argument who voted on the April 21, 1947 Decision, reargument before the full Commission should be granted (R. 569-597).

On July 28, 1947, the Commission issued an order setting the petition for rehearing for oral argument and ordered that such argument be directed to the findings of fact and conclusions of law of the April 21, 1947 Decision (R. 598, 599). Oral argument on the petition for rehearing was held before the Commission October 8, 1947. On October 15, 1947, the Commission adopted a Memorandum Opinion and Order simply stating that "After careful consideration of our Decision and Order of April 21, 1947 and the record on which they are based, we have concluded that no sufficient reason has been advanced for departure therefrom. . . ." No decision was made on respondent's request in its petition for rehearing for an opportunity at a further hearing to present testimony on the character and integrity of its principals and no decision was made on respondent's contention that dismissal as moot without hearing of the application for transfer of control to Bitner Broadcasting Company contravenes Section 309(a) of the Act (R. 600-601). E. K. Jett, Commissioner, simultaneously issued an opinion dissenting from the October 15, 1947 Opinion and Order, in substantially the same language as his dissenting opinion on the April 21, 1947 Decision (R. 602-605). Rosel Hyde, Commissioner, did not participate in either of the April 21st Decision or the October 15th Memorandum Opinion.

Respondent has continued to operate Station WORL since the expiration of its last regular license August 1, 1944, by virtue of extensions of temporary license granted by the Commission from time to time.

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SUMMARY OF ARGUMENT

1. The Court below properly held that it is arbitrary and capricious for the Commission to conclude that respondent knowingly and wilfully engaged in a continued series of misrepresentations and concealments concerning its stock ownership when the hearing record is barren of any evidence to support such conclusion. Nothing in the record contradicts the testimony of the principals that their actions were in good faith and without intent to deceive the Commission. No possible motive for concealment or misrepresentation is shown by the record. The Commission concedes that "the purpose which may have led the principals in this case to conceal the full extent of the various stock transactions is not entirely clear". Without evidence of a motive, or an affirmative showing of bad faith the Commission cannot reasonably conclude that respondent has wilfully concealed information from it. Legal authority completely supports respondent's position that it acted in good faith and without intent to deceive in not reporting certain stock transactions until clouds on the title of the stock being transferred were later removed. Since the decision is not supported by substantial evidence, the court below was right in reversing and remanding it to the Commission.

2. The court below correctly held that the Commission decision erroneously cites *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223 as precedent for denial of the WORL renewal application. The two cases are clearly distinguishable on the facts, WOKO involving deliberately and admittedly false reports to the Commission with an established motive for furnishing false information. The Commission has consistently granted renewal applications where full information was not submitted but where, as here, the applicant acted in good faith without intent to deceive. The denial of the WORL renewal application, viewed in the light of Commission

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precedents both before and after the WORL denial, is arbitrary and capricious.

3. There is no evidence in the hearing record to support the findings of the Decision that Harold A. Lafount and the Cohen brothers jointly acquired control of respondent March 25, 1937, and have at all times since acted as partners in the operation of the station. The uncontradicted testimony of the principals clearly negates such a conclusion. Both before and after the March 25, 1937, closing, majority control of respondent passed to new parties and the Commission had been so notified—yet no request was made that application be filed for consent to transfer of corporate control under Section 310 (b) of the Act. The Commission has known since 1938 that Lafount and Sanford Cohen together held 60% of respondent's stock, but did not require a transfer application to be filed. Public records show that the Law Department of the Commission recommended in 1941 that no action be taken against respondent although the facts concerning this stock ownership were known at the time. A renewal of license was granted WORL in 1942 with full notice of the 60% stock ownership of Lafount and Sanford H. Cohen.

4. It is arbitrary and capricious for the Commission to find and conclude that respondent and its principals do not possess the necessary character qualifications for a licensee of a radio station without the character and integrity of respondent having been in issue and without notice of such issue or an opportunity to introduce evidence thereon at a further hearing. A fundamental of a fair administrative hearing is notice and opportunity to be heard. The April 21, 1947 Decision is predicated upon a ground of which no notice was given and consequently no evidence was introduced thereon. Respondent's request, in its Petition for Rehearing, for an opportunity at a further hearing to introduce evidence on the character and integrity of its principals, was arbitrarily ignored by the

BLEED THROUGH – POOR

Commission in its Memorandum Opinion and Order of October 15, 1947, reaffirming its April 21st Decision.

5. Respondent had before the Commission a bona fide application for transfer of corporate control of the licensee from its present stockholders to Bitner Broadcasting Company for a total consideration of $200,000. Section 309 (a) of The Communications Act provides that the Commission shall either grant pending applications or designate them for hearing. Nothing in the Act, express or implied, authorizes the Commission to summarily dismiss as moot a bona fide application for a station license or transfer thereof. The Commission exceeded its statutory authority, its own rules, and the constitutional guarantees of the 14th Amendment, in failing to either grant or designate for hearing the application to transfer control of respondent to Bitner Broadcasting Company.

6. The Commission acted arbitrarily and capriciously in ignoring in its Decision the evidence in the record concerning the meritorious program service of Station WORL and the extent to which the present operation of the station serves the public interest, convenience and necessity of the Boston area. It is conceded that this factor alone should not be controlling in passing on the renewal application. But in the present state of the record, with no evidence of bad faith by respondent in its relationships with the Commission, the extent to which respondent is meeting the statutory standard of service in the public interest, convenience and necessity should have been weighed in determining whether to grant a renewal of license for Station WORL.

7. Petitioner's brief is based upon the assumption, not justified by the record, that respondent engaged in a course of concealment and deception; that its actions were taken with a *reckless and wilful disregard* of its duties to the Commission; and therefore respondent does not possess the character to continue operating the station. The fact

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is that there is no evidence of concealment or misrepresentation, nor of intent to conceal or misrepresent, nor of recklessness or wilful disregard of its duties as a licensee. Those elements may not be established in the manner which petitioner attempts — by piling inference upon inference. The Commission decision is based only on the alleged concealments and deceptions of respondent, with no findings or conclusions as to reckless and wilful disregard of its duties as a licensee. Petitioner on appeal is therefore attempting to inject into the case a ground for denial of the renewal which is without support in the decision from which appeal is taken. The authorities and arguments set forth in petitioner's brief are not controlling or in point on the facts of record.

ARGUMENT *

I

The Court Below Properly Held That It Is Arbitrary and Capricious for the Commission to Find and Conclude That Respondent Engaged in Misrepresentations and Concealments, or Submitted False Reports and Testimony, Without Substantial Evidence to Support Such Findings and Conclusions. The Uncontradicted Testimony by Respondent Is That Its Actions Were in Good Faith Without Intent to Deceive. That Respondent Was Governed by the Considerations Set Forth In Its Testimony Is Supported by Legal Authority and by the Fact No Possible Motive for Concealment Is Established or No Affirmative Evidence of Bad Faith Is Shown.

* Wherever reference is made herein to matter in petitioner's brief, the page number is not given because petitioner has not been able to furnish respondent with printed copy of its brief in the short time at its disposal.

BLEED THROUGH – POO

A. That Respondent or Its Principals Engaged in Misrepresentations and Concealments or Submitted False Reports and Testimony Is Not Supported by Substantial Evidence or by Legal Authority.

Section 402(e) of the Communications Act of 1934, as amended, provides that findings of fact by the Commission, *if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious.* (Emphasis supplied.) The court below found that the findings of fact and conclusions of the April 21 Decision of the Commission are not supported by substantial evidence, and are therefore arbitrary and capricious, insofar as it is found and concluded that respondent or its principals knowingly and wilfully engaged in a continued series of misrepresentations and concealments, or a planned program of deception concerning its stock ownership, or submitted false reports and testimony to the Commission.

Concealment necessarily involves purposeful or deliberate non-disclosure calculated and designed to prevent discovery of material facts. It implies deceit and fraud. A necessary element of imsrepresentation is moral delinquency, consisting of a guilty knowledge and consequent intention to deceive. The very essence of the legal conception of misrepresentation is the fraudulent intention flowing from the guilty knowledge. *Mason* v. *Moore*, 76 N. E. 932, 936, 73 Ohio Stats. 275. Likewise the term "false" denotes intentional, deliberate and wilful untruth—something beyond mere inaccuracy. *Heindel* v. *United States*, 150 F. (2d) 493, 497 (C. C. A. 6th, 1945); *Schapiro et al* v. *Tweedie Footwear Corporation*, 131 F. (2d) 876, 878 (C. C. A. 3rd, 1942). A false statement is a statement made in bad faith with intent to deceive; the facts recited must be untrue and the person reciting them must know them to be untrue. *Moulor* v. *American Life Insurance Company*, 111 U. S. 335, 345 (1884). None of these elements is established by the record.

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1. The respondent acted in good faith

The record is undisputed that respondent believed the reports and affidavits it filed with The Commission were true. Paragraphs 4 and 5 of the Conclusions and the brief of petitioner maintain that over a period of six years following March 25, 1937, respondent filed a number of reports and applications giving false information as to its ownership. But the record shows, that when making these various reports, respondent considered that the information included therein was truthful. It was not trying to conceal information. The number of reports filed is of no conquence since there was no intent to deceive when each was filed. The sworn testimony of the three principals of respondent—Lafount and the Cohens—that their actions were in good faith and without intention to deceive the Commission stands uncontradicted. There is no conclusion but one of good faith, though perhaps mistaken judgment, which can reasonably be drawn from the hearing record. This is recognized by the decision of the court below (R. 617-618).

Moreover, there is ample legal authority to support the conclusion that the principals of respondent were justified in believing that the reports being filed were true. Inasmuch as the Cohens are practicing attorneys in New York, and respondent is a Massachusetts corporation, particular reference is made to New York and Massachusetts authorities.

When the Cohens were advised of Crockwell's claim that Nordblom had raised objections to the 1937 sale, they refused to consider the purchase as having been consummated. They refused to assert ownership and would not allow the permanent certificates to be issued in their name. It is fundamental that execution of a contract depends on the intent of the parties, and the Cohens did not believe the transfer of stock had been completed at that time. *Bellows et al.* v. *McKenzie et al.*, 212 Mass. 601, 99 N. E.

BLEED THROUGH – POO

470 (1912); *Frazier* v. *Simmons et al.*, 139 Mass. 531, 2 N. E. 112 (1885).

Whether title to personal property has been transferred must be determined in accordance with the intention of the parties as shown by reasonable construction of their language and conduct. *Barrows* v. *Fuller et al.*, 253 Mass. 79, 148 N. E. 374 (1925); *Caines* v. *Sawyer et al.*, 248 Mass. 368, 143 N. E. 326 (1924).

> ". . . An agreement that property shall remain in the name of the seller is not essentially different in legal effect from an agreement that title should not pass from him." *Murray* v. *Indursky*, 266 Mass. 220, 223, 165 N. E. 91 (1929).

Thus where personal property is registered and insured in the seller's name and he retains the right to use it, legal title remains in the seller though the property is in the buyer's possession. *Hyland* v. *Hyland*, 278 Mass. 112, 179 N. E. 612 (1932).

In the instant case the Cohens had refused to accept ownership of the stock because of the defects in title; therefore title never passed to them. *Brogan et al.* v. *Warran Wallace & Co.*, 235 App. Div. 388, 257 N. Y. Supp. 200 (1932); *Ryder & Brown Co.* v. *E. Lissberger Co.*, 300 Mass. 438, 15 N. E. (2d) 441 (1938). The mere fact that they had physical possession of the stock certificates endorsed in blank does not establish ownership, especially when all the prerogatives of ownership were exercised by Nordblom, the holder of record. *Titus* v. *Wallick*, 222 App. Div. 17, 225 N. Y. Supp. 263 (1927); *Richards* v. *Wells Fargo Express Co. et al.*, 156 App. Div. 268, 141 N. Y. Supp. 306 (1913); *Schildkraut* v. *Light et al.*, 56 N. Y. S. (2d) 758, 761, rev'd on other grounds 269 App. Div. 990, 58 N. Y. S. (2d) 324 (1945).

On the contrary, the failure to affix stock transfer stamps to the certificate (R. 397) raises the presumption that no transfer of title was intended. Mass. Gen. L. Ch. 64,

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Sec. 1; *Waddle* v. *Cabana*, 220 N. Y. 18, 114 N. E. 1054 (1917); *In re Douglas' Estate*, 169 Misc. 425, 7 N. Y. S. (2d) 870 (1938). Furthermore, the transfer was unenforceable and proof thereof could not be offered or received in evidence in any Massachusetts court. Mass. Gen. L., Ch. 64, Sec. 8.

In refusing to accept full title the Cohens were merely taking justifiable precautions to protect their rights. Had they considered themselves owners of the stock, they would not only have left themselves open to possible law suits but would also have forfeited their valuable right to rescind the purchase contract.

A buyer of stock who is given cause to believe that he may have reason to rescind the purchase may not avail himself of the benefits thereof, nor may he exercise any rights of ownership over the stock, or he will be deemed to have ratified and affirmed the sale and will be deprived of his right to rescind. Mass. Gen. L., Ch. 155, Sec. 33; *McKinley* v. *Warren*, 218 Mass. 310, 105 N. E. 990 (1914); *R. A. Jones and Co., Inc.* v. *Green Bros.*, 289 Mass. 50, 193 N. E. 582 (1935). If, after hearing of Crockwell's contenition that Nordblom was dissatisfied, the Cohens had permitted a transfer of the stock upon the books of the Corporation, or the filing of a report with the Commission showing them to be owners, this would have constituted an assertion of ownership which would be considered a ratification of the sale. *McNulty* v. *Whitney et al.*, 273 Mass. 494, 174 N. E. 121 (1930); *Bassett* v. *Brown*, 105 Mass. 551 (1870); *cf. Fortier et al.* v. *Monat et al.*, 286 Mass. 335, 190 N. E. 530 (1934). Thus the course of action adopted by the Cohens was justified as necessary to protect their rights.

Petitioner in its brief, in discussing the refusal of the Cohens to accept title, makes much of the claim that the certificate for the stock was endorsed in blank and admittedly available for immediate surrender and issuance of a

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new certificate made out in the buyers' name and was transferable at the buyers' will. The important fact is not what could have been done by either party but what was actually done, to wit, the Cohens refused to take title, refused to be the owners of the said stock until all the defects were cleared up. Therefore, what the Cohens could have done is not involved in this case. The language of Judge Gray of the New York Court of Appeals in the case of *Lawrence* v. *Fox,* 20 New York 268, at page 274 aptly covers the situation:

> "It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and therefore the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; . . ."

Sanford Cohen's purchase of 200 shares of B stock at auction in 1938 was perfectly consistent. He was a purchaser in good faith for value and had not received notice of any facts making the transfer wrongful. Miss Whitwell did not file any complaints until 1939 — after the stock had been issued in Sanford Cohen's name. Sanford Cohen had therefore received an indefeasible right to the certificate and the shares represented thereby. Mass. Gen. L., Ch. 155, Secs. 31, 33, 34; *Levovsky* v. *Horvitz,* 307 Mass. 475, 30 N. E. (2d) 411 (1940).

2. The corporation was entitled to consider Nordblom as the owner of the stock

The Cohens, not considering themselves the owners of the stock, refused to permit its transfer on the books of the Corporation. Under these circumstances the licensee was justified in considering and in treating Nordblom as the owner of all the stock standing in his name.

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The Massachusetts laws provide that the person to whom a certificate is issued is deemed to be the person appearing by the certificate to be the owner thereof, and of the shares represented thereby, ". . . until and unless he endorses the certificate of another *specified* person." Mass. Gen. L. Ch. 155, Sec. 44. Furthermore, the corporation is entitled to recognize the exclusive right of a person registered on its books as the owner of the shares for all purposes: to receive dividends, to vote, and to be held liable for calls and assessments. Mass. Gen. L., Ch. 155, Sec. 29. *Lane* v. *Volunteer Co-Operative Bank, Boston,* 307 Mass. 508, 512, 30 N. E. (2d) 821 (1940); *Stuart et al.* v. *Sargent,* 283 Mass. 536, 186 N. E. 349 (1933); *Fall River National Bank* v. *Estes,* 279 Mass. 380, 181 N. E. 242 (1932).

Therefore, until there had been a transfer of the stock on the books of the Corporation, or until the stock had been specifically endorsed to the Cohens, the respondent was entitled to consider and treat Nordblom as the owner of the stock in question. This is what in fact occurred; for during the period that the stock stood in Nordblom's name every corporate duty and liability was shouldered by him. In performing these tasks he acted independently at all times. The Cohens never had any voice in the affairs of the licensee nor did they participate in its management. They were never consulted on policy nor did they ever instruct Nordblom how he was to act. In fact they had never met Nordblom until the hearings in this case (R. 329).

3. The purchase of stock in the name of Bulova was not authorized or effective

Davison had been instructed to purchase the 200 B shares being sold at auction for Sanford Cohen. Instead, he purchased the stock in the name of Arde Bulova. Bulova did not know of the purchase until after it had

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been completed. Davison's act was completely unauthorized. Therefore, Bulova was not the purchaser of the stock unless he chose to ratify the purchase. *James F. Monaghan, Inc.* v. *M. Lowenstein & Sons, Inc.*, 290 Mass. 331, 195 N. E. 101 (1935); *DeBlois et al.* v. *Boylston & Tremont Corp. et al.*, 281 Mass. 498, 183 N. E. 823 (1933).

This Bulova refused to do. Instead, he assigned the stock to Sanford Cohen. This did not constitute a ratification of the purchase in his name; he received no benefit by reason of the agent's unauthorized act beyond what he would have received if the agent had acted in accordance with his instructions, for he was merely effecting the transaction contemplated by the parties. *Kidder* v. *Greenman et al.*, 283 Mass. 601, 187 N. E. 42 (1933); *Glen* v. *Garth et al.*, 133 N. Y. 18, 30 N. E. 649 (1892) app. dis. 147 U. S. 360 (1893).

Furthermore, Bulova, by assigning the stock to Sanford Cohen, was doing only what a court would otherwise have required of him. *Boudrot* v. *Cole et al.*, 285 Mass. 353, 189 N. E. 59 (1934); *cf. St. Georges Church* v. *Primitive Methodist Church et al.*, 315 Mass. 202, 52 N. E. (2d) 401 (1943).

B. Without Evidence of a Motive or a Purpose to Be Served, or an Affirmative Showing of Bad Faith, It Cannot Reasonably Be Concluded That Respondent Engaged in Misrepresentation and Deception or Furnished False Reports and Testimony.

In its April 21 Decision, the Commission concluded that respondent and its principals knowingly misrepresented stock ownership and "submitted false reports and testimony in order to convey such impressions as it deemed expedient" yet it also concedes that "the purpose which may have led the principals in this case to conceal the full extent of the various stock transactions is not entirely clear . . .". The fact is that nothing in the record indi-

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cates a motive for deception because there was no deception. As so clearly stated by Commissioner E. K. Jett in his dissent from the April 21 Decision:

> "The majority, while 'not entirely clear' in regard to the purpose which led the principals of WORL to withhold information concerning the full extent of the various stock transactions, nevertheless believe that the Supreme Court ruling in the WOKO case would not excuse willful misrepresentations to the Commission. As I have pointed out, the motive for concealment was clearly established in the WOKO case, while no motive was established in the WORL case. Therefore, I do not feel that the record against WORL supports the finding that any of the parties are guilty of having made willful misrepresentations to the Commission."

Sections 308(b), 310(a), 311, and 313 of the Communications Act of 1934, set forth in Appendix A of this brief, enumerate the statutory qualifications of a broadcast licensee. Respondent and its principals meet all of these statutory qualifications. Lafount and the Cohens had nothing to hide from the Commission. Their business associates all were informed of the various stock transactions. Moreover, the Commission by 1938 had been notified that Lafount and Sanford Cohen together owned 60% of the stock of respondent.

Commission records show that in 1937 it was a comparatively simple procedure to obtain Commission consent, pursuant to Section 310(b) of the Act, to a transfer of Corporate control to bona fide persons. Cf. *In re Powel Crosley, Jr., Transferor* and *The Aviation Corporation, Transferee*, Docket 6767, decided December 6, 1945, 3 Pike & Fischer Radio Regulations, 6, 17. There the Commission held that it could not deny a transfer of control to persons meeting the statutory qualifications without revising "17 years of precedent and establishing new policies". The notice and publication procedure (Section 1.321 of the Rules) for competing bids on assignment of licenses and

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transfers of corporate control was not adopted until late in 1945. Thus there could be no intent to conceal stock ownership either because of any personal disqualification of the principals or because a report of the stock ownership might involve the filing of formal application for consent to transfer control. Nothing in the record suggests any other reason for the wilful or deliberate withholding of information from the Commission, nor is there evidence of bad faith on the part of respondent or its principals.

In the absence of any showing of motive or of any facts implying a motive or reason to deceive, or a showing of bad faith in dealing with the Commission, it cannot reasonably be concluded that there was a wilful or deliberate attempt by respondent to conceal information or misrepresent facts. It is arbitrary and capricious for the Commission to conclude that there has been concealment and deception *without first establishing a reason for such action.* Surely it cannot be maintained that there was concealment and deception for the sake of concealment and deception. The well known rule of law that intent is a necessary element of a fraud may properly be applied to this case. How can respondent or its principals be held guilty of fraud and deception on the Commission when no intent to deceive has been established?

C. Since the Decision Is Not Supported by Substantial Evidence, It Was Properly Reversed and Remanded to the Commission by the Court Below.

Section 10(e) of the Administrative Procedure Act, like Section 402(e) of the Communications Act, empowers the Court reviewing administrative action to hold unlawful and set aside agency action, findings, and conclusions, found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or unsupported by substantial evidence.

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Substantial evidence is evidence of quality; it must have rational probative force and be adequate to support a conclusion in the mind of a reasonable man. In short, the rules of logic and reasoning which are necessary to the accomplishment of the type of adjudication guaranteed by our system of law must be applied by the Commission, as by any trier of fact, in reaching its decision. *Consolidated Edison Company* v. *National Labor Relations Board,* 305 U. S. 197 (1938); *National Labor Relations Board* v. *A. S. Abell Company,* 97 F. (2d) 951. Under the federal rule, substantial evidence is "more than a scintilla and must do more than create a suspicion of the existence of a fact to be established." It must be enough to justify, in a jury trial, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *National Labor Relations Board* v. *Columbian Enameling and Stamping Company, Inc.,* 306 U. S. 292, 300 (1939).

It has been held that "substantial evidence" sufficient to support findings of the Federal Communications Commission means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Courier Post Publishing Company* v. *Federal Communications Commission,* 104 F. (2d) 213, 70 App. D. C. 80 (1939). Under the system of law guaranteed by our Constitution, the subsidiary facts must be reached from the evidence and the ultimate facts from the subsidiary facts, not arbitrarily or by assumption or conjecture or by a process contrary to reason, but according to reason. Although inferences are to be drawn by the trier of facts and not by the Court, the inferences must necessarily be reasoned inferences. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271 (1938).

The conclusion of petitioner that respondent has practiced wilful and deliberate fraud and deception on the Commission is not supported by relevant evidence, or evi-

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dence of quality. A reasonable mind could not conclude that there has been wilful or deliberate deception and misrepresentation because the only testimony in the record is a disavowal of intent to deceive and avowal of good faith and sincerity in the course of action taken.

It has been held that for an administrative agency to refuse to consider evidence or to make an essential finding without supporting evidence is arbitrary action, since a hearing implies both the privilege of introducng evidence and the duty of deciding in accordance with it. *Chicago Junction* case, 264 U. S. 258 (1924). Likewise, it has been held that an administrative agency is bound to give legal effect to facts established in evidence; its order should be set aside if disregard by it is shown of substantial and uncontradicted evidence having a bearing upon the issue; and to refuse to consider pertinent and substantial evidence is considered arbitrary action, sufficient to set aside its order. *Baltimore and Ohio Railroad Company* v. *U. S.*, 5 F. Supp. 929 (N. D. Ohio, 1933).* To discard "the positive credible testimony of witnesses in favor of an inference drawn from tenuous circumstances that at best could have supported only an anemic suspicion" does not meet the test of substantial evidence. *National Labor Relations Board* v. *Sheboygan Chair Company*, 125 F. (2d) 436 (C. C. A. 7th, 1942). There must be a reasonable exercise of administrative discretion having a logical relationship to the facts, which is not the case here. The conclusions of the Commission as to wilfulness and intent to mislead, not having been fairly arrived at, and not being supported by substantial evidence, can "justly be said to be palpably wrong and therefore arbitrary." *Leach* v. *Carlisle*, 258 U. S. 138, 140.

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* See also *Bonwit Teller and Company* v. *Commissioner of Internal Revenue*, 53 F. (2d) 381 (C. C. A. 2d 1931) cert. den. 284 U. S. 690 (1932) holding that although the Board of Tax Appeals may reject the uncontradicted opinion of a taxpayer's expert witness, in the absence of something in the record to support its own different conclusion, the conclusion will not be sustained.

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Since the conclusions of the Commission on the question of wilful and deliberate misrepresentation and deception are not rational conclusions supported by substantial evidence and are in total disregard of the testimony of the principals of respondent which stands undisputed, justice and equity support the decision of the court below in reversing the April 21 Decision and remanding the case to the Commission.

In reversing the Commission, the Court below properly used its judgment on the questions of law raised in the appeal. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 94. It did not substitute its own findings of fact for those of the Commission but held that the findings of the Commission do not rationally support its conclusions as to wilfulness. The court stated that upon independent search, it was unable to find "any single specific portion of the voluminous record before us which would justify the Commission's conclusion of wilfulness" (R. 616). There can be no doubt that determination by the court below under Section 402(e) of the sufficiency of the findings of fact to support the conclusions of law is a proper exercise of the judicial function. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266; *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 554 cert. den. 305 U. S. 613. The Court's decision is not concerned with the wisdom or the expediency of the Commission action, but is directed entirely to consideration whether substantial evidence supports the findings and conclusions drawn, and consideration of the improper application by the majority of the Commission of the rule of law in the WOKO case to the facts of record in this case.

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II

The Court Below Correctly Held That the April 21, 1947 Decision Erroneously Cites F. C. C. v. WOKO, Inc. (329 U. S. 223) to Support Denial of the WORL Renewal of License Since the WOKO Case Is Clearly Distinguishable In Fact and Law. That the Decision Is Arbitrary and Capricious Is Manifest From the Fact It Is the Sole Instance Where Unintentional Failure to Report Facts, With No Intention to Deceive, Has Resulted in Denial of a Renewal of License.

Petitioner relies heavily on *FCC* v. *WOKO, Inc.*, 329 U. S. 223 (1946) in support of its authority to deny the WORL renewal application. Paragraph 8 of the conclusions correctly cites *WOKO* as holding "that the Commission may refuse to renew the license of an applicant who has wilfully and knowingly misrepresented facts concerning its stock ownership in reports and applications submitted to the Commission". The decision of this court in *WOKO* states:

> "We cannot say that the Commission is required as a matter of law to grant a license on a *deliberately false* application . . . nor can we say that refusal to renew the license is arbitrary and capricious under such circumstances" (p. 229). (Emphasis supplied.)

But as the court below indicated, there is no evidence of willful or knowing misrepresentation of facts concerning stock ownership in the reports and applications which appellant has submitted to the Commission nor is there evidence of the filing of deliberately false applications. As the opinion below states (R. 615):

> "Certainly the wording of the Commission's Final Decision in this case seems unjustifiably geared so as to bring this case within the doctrine of the WOKO opinion. The majority of this Court believes that a careful examination and comparison will disclose material factual distinctions which take the instant case beyond the purview of the WOKO opinion and thus reveal

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the error of the Commission in applying the WOKO doctrine to the facts of the present case."

The court below showed in detail how the *WOKO* and *WORL* cases are plainly distinguishable on the facts. (R. 615-617). In *WOKO* the motive for the concealment was clearly established and admitted: Sam Pickard testified that his stock interest was concealed purposely so that his employer, CBS, would not learn of his manipulations in station ownership. Pickard was the admitted owner of the stock in question; he received the dividends thereon and took an active interest in the affairs of WOKO during the twelve years his stock ownership was concealed. The record holder Phelps not only did not vote or otherwise participate in the affairs of WOKO but did not even know that he was the holder of record. The Commission never at any time during those twelve years knew that Pickard owned stock in WOKO. He disclosed his ownership only upon Commission investigation. In other words, there was no question that WOKO had filed "false" statements. Pickard had intended to deceive the Commission so that he might deceive CBS.

In WORL, on the other hand, no motive has been shown for concealment or false representation. The Cohens did not assert title to their stock until all claims against the stock were satisfied, and did not participate in the affairs of the station as stockholders until their ownership of stock was reported to the FCC. They did not receive dividends. Nordblom continued to vote the stock in his name, and took an interest in the corporate affairs. A week after the March 25, 1937 closing the Commission knew that Harold Lafount had acquired 400 shares of stock and became President of appellant and ever since November 27, 1938, the Commission had been on notice that Lafount and Sanford Cohen between them held 600 shares—or 60%—of the voting stock of appellant. Ever since the fall of 1943, the Commission has been on notice of the ownership of all the stock of respondent by Lafount

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and the two Cohens. These disclosures were voluntary. They were made as soon as any of the principals of respondent asserted ownership to the stock.

Without exception, the Commission's decisions, both before and after the instant case, hold that where there has been an unintentional failure to report all the facts concerning stock ownership or other matters, with no intention to deceive or deliberate concealment, an applicant will not be disqualified as a licensee. The following cases best illustrate this consistent Commission position.

In re application of KFNF, Inc. Docket 5942, 3 Pike & Fischer Radio Regulations 52 was decided September 19, 1945. There it was held that an illegal transfer of control of KFNF, Inc. had occurred without Commission consent and without notification of the existence of an agreement to transfer control; and further that violations of the Rules had occurred in not reporting to the Commission certain stock options and managerial agreements of a very sweeping nature. However, it was held that the pending application for renewal of license of KFNF, as well as a pending application to transfer control of the station, should be granted since the violations were not wilful and "while the licensee's omissions with respect to these matters are serious, we conclude that there was no deliberate attempt on the part of the licensee to deceive he Commission".

In re application of Lake Erie Broadcasting Company, Docket 7004, decided June 28, 1947, 3 Pike & Fischer Radio Regulations 1265 involved two mutually exclusive applications for a new broadcast station in Sandusky, Ohio, which were heard in a comparative proceeding. It was held that the failure of one of the applicants to file with the Commission a chattel mortgage executed in connection with the sale of a radio station, which was restrictive of the discretionary rights of the licensee, was a violation of Section 1.342 (formerly 43.1) of the Rules, but since it

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was not a deliberate non-disclosure or concealment it would not disqualify the applicant nor so adversely affect his qualifications as to require denial of his application. Accordingly, that application was granted and the competing application denied.*

It is difficult to conceive why respondent, whose record of public service over a period of years is unchallenged, should be denied renewal of its license because of its failure to comply with the reporting requirements of the Rules, with no evidence of deliberate non-disclosure or concealment, when an application for a new broadcast station is granted *and a competing application denied* in the face of a very similar failure to comply with the same requirements of the Rules. The *Lake Erie* record contains only promises for future operation of a new station in the public interest, convenience and necessity—but the WORL record contains concrete detailed and unchallenged evidence of a long history of operation in the public interest, convenience and necessity. Moreover, grant of respondent's renewal application did not require denial of any conflicting application, as did the grant of the Lake Erie application.

A case even more squarely in point is *In Re Application of Charleston Broadcasting Company,* Docket 6611, dated November 26, 1947, 3 Pike & Fischer Radio Regulation 1753. The Commission designated for hearing the application for renewal of license of Charleston Broadcasting Company, licensee of Station WCHS, a 5 KW station on 580kc in Charleston, West Virginia, to determine whether the applicant had an interest in the competing broadcast station, WGKV in Charleston, and whether the facts con-

* In *In re Air Waves, Inc.,* Docket 6155, decided March 20, 1946, 3 Pike & Fischer Radio Regulation 142, the Commission likewise granted an application for a new station and denied a competing application upon a conclusion that while negligence or deceit in executing applications will not be condoned, an applicant is not disqualified because of misstatements, even though material, where there is substantial doubt that the misrepresentation was deliberate or negligent.

BLEED THROUGH – POOR

cerning such interest had been concealed from the Commission, in violation of the reporting requirements of its Rules. It was found that the principal stockholder of Charleston Broadcasting Company, John A. Kennedy, who had opposed the grant of Station WGKV, after such grant entered into an agreement to construct WGKV and pay all costs thereof in return for 49% of the stock of the permittee and an option to purchase an additional 11% of the stock for $2,500. When construction was completed, a certificate for 49% of the WGKV stock was endorsed in blank and given to Kennedy, although the stock remained on the corporate records in the name of the endorser, since it was agreed that Kennedy would not exercise any control over WGKV until the debts he had incurred in its construction were paid. A year later, when such debts were paid, Kennedy inquired whether the Commission would approve of his acquiring control of the new station in Charleston, and was told it would not. He thereupon sold his 49% interest and 11% option, but took an option on another 40% of the stock which he finally disposed of in 1942. At no time were any of his interests in WGKV or stock options reported to the Commission although its Rules required that reports be made.

Nevertheless, the Commission granted the WCHS renewal application on the ground that, although the option and the executory agreement for the purchase of stock should have been reported, the failure to report them was not intentional. It was held that since Kennedy testified he had been advised by an FCC employee that reporting his option was unnecessary, and also testified he did not believe he possessed a stock interest required to be reported since the conditions of the executory agreement under which he was to receive stock had not been fulfilled, his failure to report these matters was the result of a misunderstanding. For the ready reference of the court, the text of the WCHS decision is printed as Appendix B to

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this brief. Attention is directed particularly to paragraphs 3 and 4 of the Conclusions in that case.*

The record shows that some of the omissions in filing and delays in filing reports, of which the Commission Decision complains, were due entirely to oversight and inadvertence on the part of the respondent and that as soon as the matters were brought to respondent's attention, the reports were promptly filed. In this connection, the attention of the Court is directed to the following language in a Proposed Decision of the Commission granting an application for improvement of the facilities of Station KWAT, Watertown, S. D., and denying the mutually exclusive application for a new station on the same frequency in Mitchell, S. D.:

> "As contended by the Mitchell applicant, various applications filed by the Watertown applicant over a period from 1939 to 1946 contained responses to inquiries relating to its corporate stock ownership and control which were incorrect or inaccurate. Although the Commission has a right to expect that all documents filed with it shall contain true and correct information, and a licensee or applicant is not relieved of this obligation as to any application or report merely because it has given true information in some other application or report, it is evident from that fact that no wilful deception, concealment of information from, or intent to mislead the Commission is here involved. Accordingly, it is concluded that the Watertown applicant should not, therefore, be disqualified."

In re *Midland National Life Insurance Co.*, Docket 8052, adopted February 21, 1949, 4 Pike & Fischer Radio Regulatoin 1269, 1292. This language of the proposed KWAT Decision may properly be applied to the facts of record in the WORL case.

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* See also decision of September 10, 1948, granting renewal of license of Station WGKV, Charleston, W. Va., notwithstanding misrepresentations as to stock ownership. In re *Kanawha Valley Broadcasting Co.*, Docket 6558, 3 Pike & Fischer Radio Regulation 1927.

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The attention of the Court is also directed to the very recent decision of the Commission revoking its former order of revocation of the construction permit of Television Station WTVJ, Miami, Fla., and granting consent to transfer of control of the permittee corporation to Wolfson-Meyer Theatre Enterprises, Inc. The order of revocation, which was revoked, contains the following recital:

> "IT APPEARING, That the Commission, on March 12, 1947, granted the application (BPCT-183) of the said Southern Radio and Television Equipment Company for construction permit for a new television station (WTVJ) on Channel 4, Miami, Florida, said grant being made without hearing and on the basis of representations made by applicant in its application to the effect that, among other things, stockholders Venn, Nelson and Claughton would finance applicant, that for that purpose applicant had available for deposit to its account, upon grant of the application, bank checks of the aforesaid stockholders in the total amount of $214,000, and that stockholder Venn, by reason of his ownership of a majority of the voting stock would control applicant; and
>
> "IT FURTHER APPEARING, Upon examination of the information and documents obtained in the aforesaid investigation, that the above checks in the amount of $214,000 were never deposited to permittee's account after grant, that in fact permittee has never had such an account, that stockholder Claughton, about or during May 1947, withdrew from permittee and upon withdrawal had returned to him his checks in the total amount of $213,660, that about or during May 1947 the aforesaid Venn relinquished his control over permittee to Wolfson-Meyer Theatre Enterprises, Inc., Miami, Florida, and finally, that the aforesaid Southern Radio and Television Equipment Company, despite the above changes in its financing and control, forwarded to the Commission on July 6, 1948, a statement (Commission Form 323), dated as of December 31, 1947, to the effect that the same ownership and financing of permittee obtained as did at the time of filing of its original application for construction permit; and

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> "IT FURTHER APPEARING, That Southern Radio and Television Equipment Company knowingly concealed from the Commission material facts relative to its ownership and fianncial status and has, in addition, made affirmative misrepresentations of facts to the Commission."

In revoking its order of revocation following a hearing, the Commission concluded that while the permittee had failed to disclose material facts to the Commission which should have been reported and had made false statements in its application concerning proposed financing and the amount of cash which it had on hand, nevertheless the revocation order should be set aside and the transfer of control application approved.

In the *Matter of Revocation of Construction Permit of Television Station WTVJ,* Miami, Florida, and *Application for Consent to Transfer of Control of Southern Radio and Television Equipment Company,* permittee of WTVJ, Dockets 9149, 9114, decided February 4, 1949, 4 Pike & Fischer Radio Regulation 1089. Because of the recent date of this Decision and the contrast of the conclusions contained therein with the conclusions of the Decision in the WORL case, the text of the WTVJ Decision is included in full in Appendix D to this Brief.

The conclusions which the Commission has reached in the foregoing and other recent cases of similar nature are so contrary to the conclusion which has been reached in the WORL case that the arbitrary nature of the WORL Decision becomes readily apparent by comparison. The conclusion in the foregoing cases that the applicants failure to report was not wilful or designed to conceal facts from the Commission and on the evidence it must be found "that the applicant acted in good faith" is the only proper conclusion which can be reached from the record on petitioner's renewal application. It is the only conclusion which can fairly be drawn from the uncontradicted evidence.

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III

The Record Does Not Support the Conclusions of the Commission That Lafount and the Cohens Jointly Acquired Control of Appellant March 25, 1937 and Have at All Times Since Acted as Partners in Operating WORL. No Conclusion Is Reached on the Issue Whether Transfer of Control Occurred Without Commission Consent in Violation of Section 310 (b) of the Act Because the Evidence Shows No Such Violation in Fact Occurred and Further Shows That Although on Notice Since 1938 That Lafount and Sanford Cohen Together Held 60% of Appellant's Stock, the Commission Did Nothing to Require Application for Transfer of Contract to Be Filed. Public Records Show That the Commission Law Department Recommended in 1941 That No Action Be Taken Against Respondent for Violation of Section 310(b) Notwithstanding the Ownership by Lafount and Sanford Cohen of More Than 50% of the Voting Stock, and Also Show That a Renewal of License Was Subsequently Granted WORL in 1942. Assuming That a Violation of Section 310(b) Has Occurred, the Commission in the Past Has Consistently Excused Such Violations When Not Committed in Bad Faith.

The uncontradicted record shows that Lafount and the Cohens did not consider their purchases of stock in respondent a joint venture or a partnership. Their testimony specifically denies that they exercised joint control over WORL. They did not think their respective stock acquisitions resulted in a transfer of control within the meaning of the Act. The record is clear that the purchase by the Cohens of 300 shares of B stock from Nordblom through Ben S. Fisher, as agent, was negotiated separately from Lafount's purchase of 400 shares of B stock from Crockwell and Nordblom and was a separate contract to which Lafount was not a party.

Lafount testified under cross examination by Commission counsel as follows (R. 118-120):

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"Q. You have had a long familiarity with regulation of radio. Is there any other significance that you can see in the failure to report the transfer of this additional 300 shares, either to yourself or to Mr. Fisher or the Cohens?

"A. No, sir.

"Q. You are familiar with section 310 (b)?

"A. Yes, sir.

"Q. Do you know what it provides?

"A. Well, I couldn't exactly quote it.

"Q. In substance?

"A. In substance; yes, sir.

"Q. Will you tell me?

"A. If I recall it correctly, it provides that 60 days after the contract is entered into—no, scratch that.

"Q. You are thinking of some other rule. Section 310 (b) provides there may not be a transfer of control without the consent of the Commission.

"A. Oh, yes, yes, that is right.

"Q. You were there, you yourself, or together with your associates, acquiring control of the corporation, weren't you?

"A. I should say not.

Mr. Fisher: His associates, yes.

The Witness: Control? The majority of the stock? There was no control anywhere. If I bought 51 per cent of the stock, I should be taking control. That is my interpretation.

By Mr. Shuebruk:

"Q. But there were 700 shares being transferred here.

"A. Not by me.

"Q. 400 to you and 300 to the Cohens. The Cohens were your attorneys.

"A. They were buying the stock for their own use and benefit and paid their own money for it.

"Q. They were in the same office with you?

"A. I was in their office when I was in New York. My home was in Washington. I lived here, Wardman Park Hotel. I go to New York and when I was there I had a desk in their office.

"Q. You both work for Mr. Bulova?

"A. That is right.

"Q. They were your attorney, as well as Mr. Bulova's attorney?

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"A. Yes, sir.

"Q. You were associated with the Cohens in other business transactions?

"A. No, sir.

"Q. You, as well as both of the Cohens, are directors and officers, either one or the other, of the Bulova stations?

"A. We are officers in the same corporation, but we are not investors together. We are not associated in the sense of owning stock in any other enterprise.

"Q. And there was one purchase price of $52,500, for the 700 shares.

"A. There were two purchase prices, as the contracts both reveal. Added together, they total $52,500.

"Q. Well, as a matter of fact, it was understood, wasn't it, that the per share price was $75 a share?

"A. That is right, I testified to that, and that is what I mean. If, sir, I was wrong, I made a mistake, but I believe it is not wrong. I believe that is definitely consistent with the law and certainly it is with my interpretation of it."

Sanford Cohen likewise testified under cross examination by Commission counsel as follows (R. 264):

"Q. Was there ever any question about the fact that between you and Lafount that station was in your joint control?

"A. I may not want to put it that way. I would say that if Mr. Lafount and I voted together we controlled it.

"Q. I am asking you about the fact and not hypotheses.

"A. I wouldn't say that.

"Q. Under whose control was it?

"A. I said if Mr. Lafount and I voted together we had control.

"Q. Since 1937.

"A. We have not voted opposite each other. I hope we never do, but we may, I don't know. We may disagree and come to agreement on something.

"Q. As a matter of fact, you never voted?

"A. No.

"Q. Has your brother George ever voted?

"A. He wasn't a director.

"Q. He was part owner of the 300 shares.

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"A. He couldn't vote until he got the 100 shares later.

"Q. He was part owner of the 300 shares.

"A. It wasn't in his name. I couldn't vote the Nordblom stock. The record shows that Nordblom voted it. We couldn't vote it twice."

Cohen also testified under cross examination as follows (R. 254-55):

"Q. If you had reported the 300 shares with the 400 shares of Mr. Lafount's, that would have shown the Commission that a majority of the stock had been transferred on that occasion.

"A. Well, yes; but it learned later. It learned later that it was 400 and 200. In 1938 the Commission knew Mr. Lafount had 400 and I had 200. The most it would have learned the year before is that I had 300 instead of 200, or that my brother had 100 and I had 200. I am not trying to argue; I am trying to set the facts.

"Q. Had that 700 shares been disclosed to the Commission, you would have had to file application for transfer of control.

"A. I think by the same token we should have filed it as far as the 200 was concerned.

"Q. We will get into that, Mr. Cohen. You would have had to file an application for the transfer of control?

"A. I don't know.

Mr. Fisher: That is his interpretation.

Mr. Marks: I am asking if he would have.

The Witness: I am saying this, that I don't know. In my opinion, as I said to the Select Committee, that there was no reason, or I said I was doubtful under the facts in this case, that an application for a transfer would have to be made."

Although the Proposed Decision of the Commission based denial of the WORL renewal on violation of Section 310 (b) of the Act, the final decision reaches no conclusion on the issue whether transfer of corporate control occurred without Commission consent in violation of 310 (b)—and in its brief petitioner appears to abandon any contention

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on this point. This change in Commission position is understandable when evidence on past interpretation of the applicability of 310 (b) is considered. The record shows that prior to 1936 Robert C. Nordblom had no interest in respondent; but that on August 13, 1936, respondent notified the Commission of the acquisition of 500 shares, or 50%, of its voting stock by Nordblom, who was elected its President and a Director (R. 321, 322, 354). Although the Commission was on notice from August, 1936, to March 31, 1947, that Nordblom had acquired 50% of the voting stock and been elected President and Director of respondent, it never required the filing of an application for consent to transfer of corporate control to Nordblom under Section 310 (b) of the Act. It is, therefore, not difficult to understand why Lafount and the Cohens were of the opinion after the March 25, 1937 closing that no Commission consent was required for their respective acquisitions of stock in respondent.

Moreover, the record shows that on November 27, 1938, respondent reported to the Commission that Sanford Cohen had purchased 200 shares of its Class B voting stock (R. App. 355, 391). Thus, the Commission had notice on and after November 27, 1938, that Harold Lafount and Sanford Cohen held 60% of the Class B voting stock (R. 391). Notwithstanding such notice, the Commission did nothing about requiring that application be filed pursuant to Section 310 (b) for consent to a transfer of corporate control from Nordblom to Lafount and Sanford Cohen. How can respondent fairly be accused of wilful failure to comply with the requirements of Section 310 (b) when the Commission itself, having full knowledge of changes in ownership of a majority of its voting stock in 1936 and again in 1938, did nothing to require compliance with what it now interprets to be the requirements of 310 (b)?

Public records show that in 1941, Joseph A. Hines, attorney of Boston, addressed a series of letters to the Commission complaining of alleged violations of Section 310 (b)

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of the Act by appellant.* *These same records show that the attorney in the Law Department of the Commission in charge of all applications filed under Section 310 (b) on October 25, 1941, addressed a memorandum to the Assistant General Counsel in charge of broadcasting directing his attention to Nordblom's acquisition of 50% of the voting stock of respondent in 1936, and Lafount and Sanford Cohen's acquisition of a total of 60% of the voting stock in 1937 and 1938.*** The memorandum concluded as follows:

> "According to the records, the information with respect to these stock transfers, etc., was reported promptly, as required by Section 43.1 of the Commission's Rules. In view of the fact there has been no attempt to mislead the Commission, and that the transfers took place in 1936 and 1937, I see no purpose to be served at this time by presenting the matter to the Commission in connection with the station's application for renewal of license. . . .***

Thereafter, on July 7, 1942, the Commission granted respondent's pending application for renewal of license of Station WORL for the period ending August 1, 1944. Since the record is convincing that the Commission had full knowledge when granting the WORL renewal of license in 1942 that Lafount and Sanford Cohen ever since 1938 had owned 60% of the voting stock of respondent, it is apparent that such ownership was not then considered in violation of Section 310 (b). If the ownership since 1938 of more than 50% of the stock of respondent by Lafount and Cohen was not considered

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* Hearings before the Select Committee to Investigate Federal Communications Commission House of Representatives U. S. 78th Congress December 15, 1943, pp. 5025 *et seq.*

** Pp. 5030-5037, *supra.*

*** For the convenience of the Court, the complete text of this memorandum is included as Appendix C to this brief.

BLEED THROUGH – POOR

violative of Section 310 (b) in 1942, why should such ownership be held violative of 310 (b) today?

Assuming arguendo that a violation of 310 (b) occurred at the March 25, 1937 closing, it should be observed that the Commission in the past has consistently excused such violations when not committed in bad faith—*Buffalo Broadcasting Corporation,* Dockets 6324 and 6325, decided December 19, 1945; *KFNF, Inc., supra.* In the former case the Commission found that the applicant had divested itself of control of its facilities, in violation of 310 (b), but emphasized the fact that in a general way the Commission had been informed of the transfer of control because the basic agreement had been filed with it. The same is true in the present case—the Commission knew that Lafount and Sanford Cohen controlled 60% of appellant's voting stock.*

IV

The Commission erred in denying the WORL renewal of license because respondent does not possess the necessary character qualifications of a broadcast licensee when the character of respondent was not in issue and notice of such issue and opportunity to introduce evidence thereon was not afforded respondent.**

The April 21, 1947 Decision denies the WORL renewal of license because respondent "does not possess the necessary character qualifications for a licensee of a radio station". (R. 562) But none of the six issues on which hearing was held have to do with character ~~of~~ qualifications. The issues are concerned with only three questions: (1) The present ownership of respondent; (2) Pos-

* See also *In re Georgia School of Technology (WGST),* 10 F. C. C. 110; *In re Falknor and Schepp, et al. (WPAT),* 10 F. C. C. 401.

** While this contention was raised by respondent in its notice of appeal and brief in the court below, the decision of the court below does not rule upon it.

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sible transfer of corporate control without Commission consent; and (3) The accuracy of reports submitted to the Commission.

Because of the nature of the hearing issues, neither respondent nor petitioner introduced evidence on the character or integrity of respondent or its principals. The record is clear that the Commission through its counsel endeavored to prove that Arde Bulova had an undisclosed interest in Broadcasting Service Organization, Inc.; that there was a transfer of control of respondent without Commission consent in violation of Section 310 (b) of the Act; and that reports have been made to the Commission since 1937 falsely representing the ownership of respondent. The evidence which respondent introduced in the record likewise bears only on these points, except for testimony concerning the merit of its programming and station operation.

The Proposed Decision of October 24, 1945 made no mention of the contention that Arde Bulova held an undisclosed interest in respondent, which contention is completely disproved by the record and thus properly disregarded; but it held that the renewal should be denied because a transfer of control without Commission consent had occurred March 25, 1937 and because respondent had submitted false reports and testimony to the Commission concerning this transfer of control and other matters. No mention was made of character considerations. Respondent's exceptions and oral argument thereon were directed wholly to these grounds for the proposed denial, with character considerations still not in issue.

The April 21, 1947 Decision recast the Proposed Decision so that no conclusion was reached concerning the alleged illegal transfer of control, but it was found that the license should be denied because of the lack of character of respondent. This was the first time that the question of character had been raised. As a result, in its

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Petition for Rehearing of May 13, 1947, respondent urged that ". . . since, for the first time *in the entire proceeding,* a question has been raised concerning the character and fitness of its principals, justice and equity require that the hearing record be reopened to afford opportunity for the applicant to submit evidence concerning the character of its principals and their moral fitness to be licensees of a radio station. . . ." In ordering oral argument on the Petition for Rehearing, petitioner directed that such argument be directed to the Findings of Fact and Conclusion of Law of the April 21, 1947 Decision, *thus foreclosing oral argument on respondent's request for a further hearing to introduce character evidence.* The October 15, 1947 Memorandum Opinion reaffirming the April 21, 1947 Decision makes no decision on, or mention of, respondent's request for a further hearing.

Section 1.803 of the Commission's Rules provides that "reasonable notice of hearing shall be given to all parties to a proceeding" and Section 1.803 (c) provides that such notice shall include "a statement of the matters of fact and law involved in the hearing". This is in accord with the substantially similar notice requirements of Section 5 (a) of the Administrative Procedure Act. Section 1.803 of the Rules supersedes the former Section 1.196 of the Rules, in effect at the time of the WORL hearing, which provided that notice of hearing issues in broadcast cases should be published in The Federal Register "not less than 30 days in advance of the hearing date".

These Rules of the Commission and Section 5 (a) of the Administrative Procedure Act implement and codify the well established rule of administrative law that "the right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them".* It has been held that where proceedings are had under the aus-

* *Morgan, et al.* v. *U. S., et al.,* 304 U. S. 1, 18.

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pices of administrative authorities, all claims must be appropriately set forth so that they may be open to challenge and opposing evidence.** The test of a fair hearing is whether the issues are clearly defined so that the respondent can address itself to the charges made against it. *West Ohio Gas Company* v. *Public Utilities Commission,* 294 U. S. 63 (1935); *N. L. R. B.* v. *Mackay Radio and Telegraph Co.,* 304 U. S. 333, 350 (1938).*** In *Brahy* v. *Federal Radio Commission,* 59 Fed. 2d 879, 61 App. D. C. (1932) it was held:

> "While the burden is on the applicant for a renewal of license justice requires that he should receive notice of charges a sufficient time in advance of hearing to enable him to prepare his defense. . . . An applicant, especially one whose station has been operating for years without being a subject of complaint, ought not to be compelled to incur the expense of producing witnesses at a hearing to meet possible or imaginary charges. He is entitled to reasonable notice of the specific issues to be determined at the hearing. . . ."

The record shows that of the three stockholders of respondent, one is a successful businessman with long experience in government and radio, including service as a member of the former Federal Radio Commission, and the other two are members of the New York Bar, who have practiced corporation law for many years. After indulging in a surprise attack on the character of these men in its April 21, 1947 Decision, the least that the Commission should have done to assure a fair hearing on the renewal application was to grant respondent an opportunity, as requested in its Petition for Rehearing,

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** *Crowell* v. *Benson,* 285 U. S. 22, 48 (1932).

*** *Cf. Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197, 226-229 (1938); *N. L. R. B.* v. *Biles Coleman Lumber Co.,* 98 Fed. 2d 16, 18 (C. C. A. 9th, 1938); *N. L. R. B.* v. *Hearst,* 102 Fed. 2d 658, 662 (C. C. A. 9th, 1939). Also see *DeJonge* v. *Oregon,* 299 U. S. 353 (1937); *Schneiderman* v. *U. S.,* 320 U. S. 118, 159 (1943); *Tadano* v. *Manney,* 160 Fed. 2d 665 (C. C. A. 9th, 1947).

BLEED THROUGH – POOR

to introduce evidence at a further hearing on its character and that of its principals. Section 405 of The Communications Act specifically empowers "the Commission to grant such a rehearing if sufficient reason therefor be made to appear". There are precedents from numerous other administrative boards and Commissions which hold that, where a case is decided on grounds other than those raised in the administrative hearing, justice and equity require that the hearing record be reopened to receive further evidence on the grounds of the decision before final administrative determination is made. *Commissioner of Internal Revenue* v. *Skaggs,* 122 Fed. 2721 (C. C. A. 5th, 1941); *In the Matter of Frank R. Moll et al.,* Securities and Exchange Act of 1934, Release #3600; *Harriet Cotton Mills* v. *Gulf, M. & N. Ry. Co.,* 223 I. C. C. 653; *In the Matter of Cities Service Power and Light Co.,* S. E. C. Holding Company Act, Release #4551.*

Respondent submits that for the Commission to deny its renewal because of a lack of character qualifications, without affording notice of an issue on character qualifications and an opportuinty to present evidence thereon, is to deprive respondent of the fair hearing on its renewal application to which it is by law and rule entitled.

* *Cf. In the matter of Beech Grove Coal Co.,* Docket 1748—F. D. Bit. Coal Division; *In the matter of Breeze Corporations, Inc.,* 3—S. E. C. 709 (1938).

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V

The Commission violated its own rules, exceeded its statutory authority, and deprived respondent of its property without due process of law in denying a hearing on the joint application for transfer of control of respondent from its present stockholders to Bitner Broadcasting Company.**

A period of 18 months elapsed between the October 24, 1945 Proposed Decision and the April 21, 1947 Decision denying the WORL renewal application. On August 26, 1946, ten months after issuance of the Proposed Decision, a joint application was filed requesting Commission consent, pursuant to Section 310 (b) of the Act, to transfer all the stock in respondent from Harold A. Lafount, Sanford H. Cohen and George Cohen to Laurence S. Bitner and Dominic J. Perri, sole stockholders of Bitner Broadcasting Company, Boston, Massachusetts, for a total consideration of $200,000. The application was in proper form, was duly subscribed and sworn to, and was accepted for filing by the Commission and assigned File Number B1-TC-506. (R. 606)

Section 1.321 of the Rules requires that when application is filed for consent to transfer control of a corporation holding a broadcast license, notice of the terms and conditions of the proposed transfer shall be published at least twice a week for the three weeks immediately following the filing of such application in a daily newspaper of general circulation published in the community in which the station is located. The notice shall state that any other person desiring to purchase the facilities upon the same terms and conditions may file an application with the F. C. C. within 60 days from the date of first publication of the notice. The F. C. C. likewise shall pub-

** The court below held that it was unnecessary for it to make a decision at this time on this contention since the case was being reversed and remanded to the Commission on other grounds. (R. 619)

BLEED THROUGH – POOR C

lish such notice in The Federal Register. The Commission will not act on the transfer application until the 60 day period has expired. Section 1.321 (c) of the Rules then provides in part as follows:

> "If no competing application is filed within this 60 day period, the Commission will consider the original application upon its merits and will grant it if it appears from an examination of the application and supporting data that public interest will be served thereby; otherwise it will be designated for hearing. . . ."

Pursuant to Section 1.321 of the Rules, publication of the proposed transfer was made by the proposed transferors twice a week for three weeks in the Boston Daily Globe, from August 28 to September 14, 1946. Simultaneous publication was made by the Commission in The Federal Register. At no time during such period or at any time thereafter was any application filed with the F. C. C .by any person or group desiring to acquire the outstanding stock of Broadcasting Service Organization, Inc. on the same terms and conditions as Bitner Broadcasting Company. (R. 606-607)

When the 60 day waiting period for competing applications expired October 27, 1946, the Commission did not consider and act on the pending application for transfer of control of respondent to Bitner Broadcasting Company, as required by Section 1.321 (c) of its Rules. Having accepted the application for filing, and having published notice of such filing in The Federal Register, pursuant to Section 1.321 (a), without any competing applications being received, the Commission was bound by Section 1.321 (c) to either grant the transfer application or designate it for hearing. Instead, it took no action on the application until six months later, when in the concluding paragraph of its April 21, 1947 Decision denying the application for renewal of license, it stated that:

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> "In view of our action denying the application for renewal of license, the application for transfer of control of Broadcasting Service Organization, Inc., from its present stockholders to Bitner Broadcasting Company (File No. BL-TC-506) has become moot and is therefore dismissed". R. 564

Respondent submits that, aside from the provisions of Section 1.321 (c) of the Rules requiring that its transfer application either be granted or designated for hearing, Section 309 (a) of the Communications Act compels the Commission to take such action and does not permit a summary dismissal of the application as "moot". Section 309 (a) provides that if upon examination of any application for station license the Commission does not determine that public interest will be served by the granting thereof "it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe".* As Mr. Justice Douglas stated in *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327 (1945), "it is thus plain that 309 (a) not only gives the Commission authority to grant licenses without a hearing, but also gives applicants a right to a hearing before their applications are denied . . ." Nothing in the Act, express or implied, authorizes the Commission without hearing to involuntarily dismiss a bona fide application for a station license or transfer thereof which has been filed in accordance with its Rules and has

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* The Senate report on The Communications Act of 1934 (Sen. Report #830, 74d Congress) says: "Section 309 provides for hearings and is copied from Section 11 of the Radio Act". The Conference report on the Radio Act of 1927 (Sen. Doc. 200, 69th Congress) contains the following legislative statement:

> "Section 11 authorizes the licensing authority ..... to issue licenses upon examination of the application if it determines that public interest, convenience or necessity would be served by the granting thereof. It provides, however, that in the event the licensing authority upon examination of an application does not reach such decision with respect thereto, it shall then notify the applicant and fix and give notice of a time and place of hearing on the application."

BLEED THROUGH – POOR

been accepted for filing. Such application must either be granted without hearing or designated for hearing. The action of the Commission in not following the statutory alternatives is therefore reversible error.

The petitioner may urge that since its April 21, 1947 Decision denied the renewal of license of Station WORL, respondent no longer had a broadcast license and, therefore, the requested transfer of license to Bitner Broadcasting Company necessarily became a moot question. But such argument ignores the facts. The last regular broadcast license for the operation of Station WORL expired August 1, 1944, yet respondent has continued as licensee of WORL on a temporary basis until the present. Respondent now is now no less a licensee, and on April 21, 1947, was no less a licensee, than on August 26, 1946 when its transfer application was filed with and accepted by the Commission or on August 28 or September 14, 1946, two of the dates when the Commission published notice in The Federal Register, under Section 1.321, of the pendency of its application for transfer of control. If respondent has not had a license susceptible of transfer since August 1, 1944, why did the Commission on August 26, 1946, accept for filing an application of transfer of control and subseqeuntly publish notice of such transfer pursuant to its Rules? When the Commission on April 21, 1947 dismissed its transfer application as "moot", respondent was in fact operating Station WORL and was in a position, subject only to Commission consent, to surrender control of the facilities of the station as a going concern to Bitner Broadcasting Company for $200,000. This is not a moot state of affairs. From respondent's point of view, it is very real.

Even if its own rules and the Act did not specifically require the Commission to give respondent a hearing on its transfer application, the Constitutional guarantee of the 14th Amendment against the taking of property without due process of law would require that a hearing be

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held on such application. A long line of cases hold that in the administrative process, the "inexorable safeguard" of a fair and open hearing must be maintained in its integrity. *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38 (1936); *Morgan* v. *U. S.*, 298 U. S. 468; *I. C. C.* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88 (1913). The right to such a hearing is one of "the rudiments of fair play" assured to every litigant by the 14th amendment as a minimal requirement. *Chicago M. & St. Paul Ry. Co.* v. *Polt*, 232 U. S. 165 (1914); *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63 (1935); *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673 (1930); *B. & O. R. R.* v. *U. S.*, 264 U. S. 258 (1924). As has been so well put by Mr. Justice Holtzoff in a recent case, *American Eagle Fire Insurance Co. et al.* v. *Jordan et al.*, U. S. District Court, D. C., June 25, 1946 (67 F. Supp. 76):

> "In spite of the differences that exist between the judicial and the administrative process, both have certain elements in common. One of these features is that each must comply with the requirements of due process of law, and must pursue procedure that does not transcend these limitations. Due process of law is a process that hears before it condemns. The requirement of a hearing is one of the fundamental principles imbedded in Anglo-American jurisprudence. It is as inexorable a requirement in administrative proceedings involving delegated legislative authority or a quasi-judicial function, as it is in the determination of controversies in courts of law. It is axiomatic that to adjudicate personal or property rights without giving interested parties an opportunity to be heard is contrary to our basic ideas of substantial justice. No encroachment or inroad should be permitted or tolerated in respect to an indispensable safeguard so vital and precious as the right to a hearing before final adjudication."

Respondent submits that in summarily dismissing its transfer application, without hearing, the Commission has in necessary effect denied such transfer without afford-

BLEED THROUGH – POOR

ing respondent an opportunity to demonstrate through the hearing process that a grant of the requested transfer of control would serve the public interest, convenience, and necessity.* Such action, in contravention of the Commission's Rules, the Communications Act, and the Constitution, is clearly reversible error.

VI

With the record barren of affirmative evidence of bad faith or intention to deceive, it was arbitrary and capricious for the Commission in its decision to ignore the evidence on the meritorious program service of WORL and to not weigh the extent to which respondent meets the statutory standard of service in the public interest, convenience or necessity.

In *Federal Communications Commission* v. *WOKO, Inc., supra,* the Supreme Court held that it is not arbitrary and capricious for the Commission to refuse to renew a broadcast license without consideration of the merits of program service where the applicant has filed *deliberately false applications* and has been guilty of a systematic course of deception. But here, with the record barren of evidence of concealment and deception, it is clearly arbitrary and capricious for the Commission to not weigh the the evidence on the extent to which the program service and operation of WORL by respondent meets the statutory standard provided by Section 309 (a) of the Act of Service in the "public interest, convenience, or necessity".

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* This summary action is to be contrasted with the Commission Decision in another recent case—*In the Matter of Julio M. Conesa, Ponce, Puerto Rico,* Docket 6105, *et al.,* decided April 22, 1946, 3 Pike & Fischer Radio Regulation 158—wherein renewal of license was granted for Station WPRP, Ponce, simultaneously with the grant of assignment of license of WPRP to a new corporation, upon the finding that although Conesa had on a number of occasions failed to comply with Commission reporting and technical requirements, his renewal should be granted, among other reasons, because he was assigning his license to the new corporation which he did not control.

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The record shows that respondent has been given the McNinch Award of the broadcasting industry for outstanding public service on WORL, and that regular time on the station is devoted free to more than 70 national and local organizations in addition to numerous government agencies, for public service programs. The station has gained listener acceptance to the point where it is a tie for first place during daytime among Boston listeners. In 1937, respondent had $38,000 in debts and was consistently losing money; yet in 1943, it showed a net profit of $25,100. on total receipts of $240,468. Is this evidence which petitioner may completely ignore in determining whether a renewal of the license of respondent will serve the public interest?

In a recent case the Commission granted a renewal of license for Station WSOO, Sault St. Marie, Michigan, despite the applicant's failure to file balance sheets, income statements and the reports for several years, since it appeared, among other things, that the applicant was rendering an improved broadcast service and was remedying its past deficiencies. *In re application of Hiawathaland Broadcasting Company,* Docket 6208, decided September 12, 1945, 3 Pike & Fischer Regulation 44. This case is typical of many in which, despite omissions in the filing of reports or other violations of the rules, renewals of license have been granted upon consideration of counterbalancing factors, particularly meritorious program service and continued operation in the public interest.* Moreover, in a number of cases which involved undoubted fraud and deception, with deliberate concealment, renewals of license have been granted upon consideration of meritorious program service and operation in the public inter-

* *In re Cannon System LTD. (KIEV),* 8 F. C. C. 207; *In re Lee E. Mudgett (KRKO),* 8 F. C. C. 226; *In re KVOS Inc. (KVOS),* 8 F. C. C. 172; *In re Arthur Faske (WCNW),* 8. F. C. C. 570.

BLEED THROUGH – POOR

est.** It would therefore seem wholly arbitrary, in the absence of evidence of fraud or concealment, for the Commission to refuse to weigh the undisputed evidence rgarding the program service and operation of WORL in the public interest.

VII

Petitioner's Brief Is Based Upon the Assumption, Not Justified by the Record, That Respondent Engaged in a Course of Concealment and Deception; That Its Actions Were Taken With a Reckless and Wilful Disregard of Its Duties to the Commission; and Therefore Respondent Does Not Possess the Character to Continue Operating the Station. The Fact Is That There Is No Evidence of Concealment or Misrepresentation, nor of Intent to Conceal or Misrepresent, nor of Reckless or Wilful Disregard of Its Duties as a Licensee. Those Elements May Not Be Established in the Manner in Which Petitioner Attempts — by Piling Inference Upon Inference. The Commission's Decision Is Based Only on the Alleged Concealments and Deceptions of Respondent, With No Findings or Conclusions as to Reckless and Wilful Disregard of Its Duties as a Licensee. Petitioner on Appeal Is, Therefore, Attempting to Inject Into the Case a Ground for Denial of the Renewal Which Is Without Support in the Decision From Which Appeal Is Taken. The Authorities and Arguments Set Forth in Petitioner's Brief Are Not Controlling or in Point on the Facts of Record.

While the arguments in Petitioner's brief have been substantially answered in the foregoing points, some further comment on petitioner's brief may be of interest to the Court.

** *In re Georgia School of Technology (WGST)*, 10 F. C. C. 110; *In re Panama City Broadcasting Company (WDLP)*, 9 F. C. C. 208; *In re Ocala Broadcasting Company (WTMC)*, 9 F. C. C. 223; *In re Navaro Broadcasting Association (KAND)*, 8 F. C. C. 198; *In re KTBC, KNET, KRBA, KGKB, KSAM, KGFL*, 8 F. C. C. 445-484 incl.; *cf. In re John H. Stenger, Jr. (WBAX)*, Docket 6723, Decided May 29, 1946.

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The Commission's Decision does not include any Findings of Fact or Conclusions of Law as to the alleged reckless and wilful disregard by respondent of its duties and responsibilities as a licensee, of which the brief of petitioner here complains. It is proper that the Decision contains no Findings and Conclusions on heedlessness or recklessness because the record will not support it. It must be remembered that the Commission's refusal to renew is predicated solely on the alleged misrepresentation, concealment, and deception from which it is concluded that the respondent does not possess the requisite character to remain a licensee (R. 562). As has been emphasized, this ground for the Decision necessarily involves wilfulness and bad faith, of which there is no evidence. The brief of petitioner, in attempting to expand the ground of the Commission's Decision to include heedlessness and recklessness, is necessarily injecting into the case a ground for denial which is without support in the Decision from which appeal is taken. It is certainly too late at this time for petitioner to seize upon a new ground (which is not supported by the record) to attempt to justify the Commission's Decision based on lack of character due to misrepresentations and concealments. This Court on review should not go beyond the stated grounds of the Commission's Decision.

A fundamental defect with the position of the Commission in its Decision and in its brief is the attempt to support the conclusion of concealment and deception by piling inference upon inference. Petitioner first states that there were certain deficiencies in filing on the part of respondent, and then draws the inference that they were the result of wilful deception and then upon that inference draws further inference that respondent lacks the requisite character qualifications to be entrusted as a radio station licensee. The fallacy of this line of reasoning is the complete absence from the record of evidence of wilfulness or intention to deceive or bad faith on the part of respondent.

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Petitioner states that the Court below did not challenge the findings of the Commission that over a period of 6 years and on numerous occasions respondent misrepresented facts in reports required by and made to the Commission. The fact is that the Court specifically held, as did dissenting Commissioner Jett, that there were no such misrepresentations or concealments. It is very significant that even in the majority Decision of the Commission it is conceded that the purpose which may have "led the principals in this case to conceal the full extent of the various stock transactions is not entirely clear". Men do not misrepresent or conceal simply for the purpose of misrepresenting or concealing. No person of mentality or intelligence would risk a substantial property interest simply for the pleasure of misrepresenting or concealing. The fact is that there was no misrepresentation; there was no concealment; and there was no evidence to sustain the finding of the Commission on these points. To say that the Court of Appeals did not challenge the finding of the Commission is a startling statement since the Court of Appeals stated specifically and definitely that it was unable, after a careful examination of the record, to find bad faith and stated that "the record amply supports respondent's protestations of good faith" (R. 617). Certainly if the record does demonstrate good faith, there can be no concealment nor misrpresentation.

Petitioner also claims in its brief that the Court below held that the decision of this Court in the WOKO case "must be narrowly restricted to its facts". This contention is apparently in furtherance of petitioner's claim in its petition for certiorari that the supervision of this Court is needed to control the actions of the Court below. What the Court below said was that it believed a careful examination and comparison discloses material factual distinctions which take this case beyond the purview of the WOKO opinion (R. 615-617). Point II above demonstrates this to be so.

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Petitioner in its brief continually refers to "the admitted misrepresentations and concealments of the respondent". Nowhere in the record, or in any of the briefs of respondent, has there ever been any admission by respondent that there have been misrepresentations and concealments. In fact, the respondent has repeatedly denied that there were any misrepresentations or that they had concealed anything from the Commission. The record fully confirms and supports this denial.

In petitioner's brief there are several instances where mention is made of the inquiry before a Select Committee of the House of Representatives. These references have apparently been made in an attempt to hint that no disclosure would have been made by respondent had it not been for the hearings before the Select Committee. This Select Committee did not have for its purpose an inquiry into the affairs of Broadcasting Service Organization, Inc., but was a Select Committee appointed to investigate the Federal Communications Commission. Nowhere in the record does it appear that any action was taken by the respondent because of, or as a result of, the activities of that Committee. The report of the Cohens' ownership of the 300 shares was filed with the Commission promptly upon the settlement of the Nordblom claims and assertion of ownership by the Cohens. A number of the other stock reports, of which petitioner complains, were filed prior to the existence of the Select Committee.

Petitioner questions the position of the Cohens that they refused to accept ownership of the 300 shares until the Nordblom dissatisfaction was settled, inasmuch as George Cohen was willing to purchase an additional 100 shares from Nordblom in 1940. However, petitioner's brief overlooks the fact that the testimony of George Cohen shows that the 100 shares which he bought in 1940 were purchased by him in the belief that he would thereby settle the Nordblom dissatisfaction. In this connection, George Cohen testified as follows (R. 285):

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Question (by Commission counsel): "How did it happen that you later acquired the additional 100 shares from Mr. Nordblom as a transfer from certificate B-51"

Answer: "As Mr. Lafount stated, he had learned that Mr. Nordblom wanted to sell it and he asked me whether I would buy it, and so I thought I would buy it. I thought in that way we might clear the whole situation, and we bought it. And then Mr. Nordblom again stated that he was dissatisfied."

In petitioner's brief, it is claimed that Nordblom's dissatisfaction as to the 100 shares of Class B stock stems from 1943 when he wrote a letter to Lafount and received a reply from Lafount. As a matter of fact, Nordblom, who was called as a witness for and on behalf of the Commission, testified as follows (R. 343):

Q. "Did you remain on from 1940 to 1943 on account of your being dissatisfied in connection with the matter of the determination of the 100 shares?

A. "To the best of my recollection, that may have been a part of the reason why I stayed there, because I was dissatisfied."

In the brief of petitioner, the point is made for the first time that on July 12, 1937 Arde Bulova loaned Crockwell $500 on a 6 months note and as security for the note Crockwell pledged 200 shares of Class B stock still owned by him. The point is further made that sometime, date not given, Crockwell pledged 900 shares of Class A (non-voting) stock as security for another loan. Apparently, it is not contended that either of these pledges were at that time required by rules of the Commission to be reported, but criticism is based on the fact that on May 11, 1938 the Commission promulgated Rule 340.01 which required all licensees to submit within 30 days certain information required by form 728 including a request for "information relative to all contracts (written or oral) or other instruments which affect or concern. . . . the ownership or control over the station or rights and interest therein".

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Criticism is made that on July 11, 1938, when the stock was still pledged, applicant executed form 728 which showed Crockwell to be the owner of the shares and in response to the question concerning instruments which affect or concern the ownership or control over the station or rights and interest, applicant stated that there was "None".

In the first place, these criticisms are nowhere contained in the Findings of Fact or Conclusions of the Decision of the Commission or in the decision of the Court of Appeals, and are raised for the first time on this appeal by petitioner, in an apparent attempt to bolster the weakness of its case. Further, we submit that these instruments did not affect the ownership or control over the rights to the station or rights and interest therein. Until the pledged stock was sold, as it later was, the report made by the respondent was correct. It is very significant that with all the picayune criticism made of the actions of the respondent, this contention on the failure to report the pledges is now made for the first time. In this instance, as in all other instances which are cited by petitioner in an effort to add weight to its case, there is no basis for any conclusion of bad faith, concealment or deception.

Petitioner gives an erroneous account of the transaction involving the 100 shares sold to George Cohen on September 24, 1940. It states that the transfer was made on November 15, 1943, before Nordblom's claim had been settled. This ignores entirely the testimony given in this case. On page 280 of the record, George Cohen testified that he had learned of Nordblom's dissatisfaction of this transaction from Lafount, as recounted by Crockwell; and he had learned of Miss Whitwell's claim that all the stock belonged to her. His testimony further continues (R. 280):

> "I said I wasn't going to transfer it on the books and I wasn't going to vote any of the stock or act with respect to the stock until Mr. Lafount cleared up the situation, not only for that 100 shares, but for the other 300."

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> "It was finally cleared up when Mr. Davison arranged for the payment of $750 to Mr. Nordblom and a release was given, but I think Mr. Lafount had been told over the telephone by Mr. Davison that it was settled, and then we transferred the stock and then made a report of it."

This testimony shows that the transfer was made as soon as there was a telephone report. All the parties felt that this telephone assurance was sufficient, and the transfer was made, knowing that the release would be forthcoming. The contention of petitioner entirely disregards this testimony and draws an inference that the record does not justify.

Petitioner claims that the $750 payment was only for the 1940 transaction. The proof is overwhelming that Crockwell had told Lafount that Nordblom was dissatisfied. While the Commission has referred to a letter of Nordblom, releasing only the 100 shares, the proof is that that release had been rejected. Respondent's Exhibit "1" is the letter of November 27, 1943, from Nordblom to Lafount which releases not only the 100 shares of Class B stock, but also all other claims "arising out of your purchase from me of both Class A and Class B Common shares" for the sum of $750. (R. 350) The petitioner also disregards the testimony of George Cohen (R. 286) under cross examination by Commissions Counsel as follows:

> "Q. The $750 is still unallocated between you?
> "A. It is my present belief it is all covered; but if it isn't, I will pay him."

This clearly indicates that the settlement of $750 was not for the 100 shares bought in 1940, but covered, as well, the 300 shares in 1937. If the $750 was in settlement of the 100 shares, then it would be an obligation to be paid entirely by George Cohen. It is only because it includes settlement for the other 300 shares as well that any need arises for an allocation of the amount of the settlement between the two Cohens.

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Petitioner's Brief discusses the acquisition by Sanford Cohen of the 200 shares of Class B stock from Crockwell on July 28, 1938. The gist of the Commission's argument is that since Davidson had bid in those shares upon foreclosure in the name of Arde Bulova, a transfer of title to the stock from Crockwell to Bulova was therefore effected. This entirely disregards the facts of the transaction. The testimony definitely shows that because of the failure of Crockwell to pay the $5,000 loan he had obtained from Bulova, for which he had put up the 200 shares of B stock as collateral security, Bulova directed a foreclosure of his lien upon the shares. The record further shows that Davison had been directed to purchase the shares for Sanford Cohen, who had gone on a vacation to California and did not return until September. In the meantime, Davison, contrary to his instructions, bought the stock in the name of Bulova. *This stock was never delivered to Bulova.* He did not desire to purchase it. Accordingly, upon Sanford Cohen's return from California, the matter was taken up with Davison who was informed that the purchase was improperly made and that Bulova did not want to buy the stock and had no intention of buying it. Under these circumstances, Mr. Bulova was never the owner of the stock. Sanford Cohen, who directed that the stock be bought for him, was not the record owner until some affirmative step was taken to bring the transfer into his name. Thus, there was no transaction that could be reported to the Commission until the stock was properly in his name. When this was done, report was made to the Commission.

Petitioner's Brief discusses the purchase of 900 shares of Class A stock by Lafount from Crockwell on March 8, 1939 and the failure of Lafount to immediately report this transaction. Subsequently, on April 1, 1940 respondent filed application for a construction permit to improve its facilities; and in this application listed Lafount as owning 900 shares of Class A stock. The Commission not having any prior record of Lafount having purchased such shares, inquired

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of respondent concerning the same. In response to this inquiry, a report was filed on April 15, 1940 showing that the 900 shares had been transferred from Crockwell to Lafount on March 8, 1939. This course of events proves conclusively that *there was no wilful refusal to report nor was there an attempt at concealment.* If respondent desired to conceal this stock transfer it certainly would not have mentioned Lafount's ownership of the 900 shares in the application for a construction permit. The most that can be contended by petitioner is that there was an oversight in not reporting the transaction sooner. But such an oversight is far removed from wilful misrepresentation or concealment.

Petitioner cites *People* v. *Jernatowski,* 144 N. E. 497, 238 N. Y. 188, on the question of the recklessness or wilfulness of respondent's actions. In the first place this is a criminal case (involving the crime of murder), and is based largely on a statutory definition of that charge. The Court did hold, in effect, that under the circumstances of that case, no specific motive or intent to bring about the criminal act need be established when it is shown that the defendant acted with *reckless* and *wilful disregard* of the consequences of his conduct (firing a gun into decedent's house) under circumstances when the harmful consequences of that conduct could have been foreseen.

There is, in the instant case, not the slightest evidence of *recklessness* or *wilful disregard* of the respondent's obligations to the Commission, nor is there present any evidence of a result of Appellant's actions which produced "harmful consequences" to the Commission, the public, or anyone else. This is recognized by the decision of the Court below in the following language (R. 618):

> "Failing in its efforts to specifically establish a lack of good faith on the part of appellant, appellee in its brief next attempts to show appellant's lack of qualifications as a licensee by resort to inference and presumption. In its brief, appellee states: "Appellant

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fails to recognize that a reckless disregard of the duties and responsibilities of a licensee manifested over a substantial period of time by gross carelessness and wilful disregard of the true facts known to the licensee or available to it, in making reports to the Commission, may as clearly demonstrate a want of qualifications to be a licensee as the making of misstatements for a revealed motive." The chief difficulty with this statement is that it presupposes "reckless disregard" of duties and "gross carelessness and wilful disregard" of facts by appellant which are not shown by the record. Nor is the absence in the record of evidence of wilful and reckless disregard cured by appellee's attempted analogy between this case and cases of imputed intent in torts or in criminal law because such allegedly analogous cases all require a showing of heedlessness of the foreseeable harmful consequences. Here there is no substantial evidence of any heedlessness and it is conceded that there have been and can be no harmful consequences flowing either to the Commission or to the public interest as a result of appellant's improper reports."

In point B of its brief, petitioner cites *National Labor Relations Board* v. *Link Belt Co.*, 311 U. S. 584; *Republic Aviation Corp.* v. *National Labor Relations Board*, 121 F. 2d 658, and other cases in support of the proposition that the Commission may draw inferences from the facts and that it is the Commission, not the Courts, which is empowered to draw such inferences. Respondent does not take issue with the principles of law embodied in these cases. It is sufficient to point out, as specifically stated in the Republic Aviation case, that inferences which administrative agencies may draw must be *reasoned inferences based upon the facts proven, which is not the case here.* The authorities cited by petitioner do not hold that where findings of fact are not supported by substantial evidence, as in the instant case, they shall be conclusive on appeal, nor do they hold that unreasonable inferences or inference upon inference may be drawn from the facts of record. The cases cited by respondent in point I above clearly

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show that although inferences are to be drawn by the agency and not by the Court, such inferences must necessarily be reasoned inferences having a logical relationship to the facts. *National Labor Relatinos Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271. The several cases included in the brief of petitioner necessarily so provide and are, therefore, not in point on this appeal.

CONCLUSION

The Decision of the Court below should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATUTES INVOLVED

The Sections of the Radio Act of 1927, the Communications Act of 1934, as amended, and the Administrative Procedure Act, which are involved in this appeal are:

Sections 307(a) and 307(d) of the Communications Act of 1934, as amended:

> Sec. 307(a). The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.
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>
> Sec. 307(d). No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

Sections 308(a) and 308(b) of the Communications Act of 1934, as amended:

> Sec. 308(a). The Commission may grant licenses, renewal of licenses, and modifications of licenses only upon written application therefor received by it: Provided, however, That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, with-

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out such formal application. Such licenses, however, shall in no case be for a longer term than three months: Provided further, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

Sec. 308(b). All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

Section 11 of the Radio Act of 1927, substantially reenacted by Section 309(a) of the Communications Act of 1934, as amended:

Sec. 309(a). If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportuinty to be heard under such rules and regulations as it may prescribe.

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Sections 310(a) and 310(b) of the Communications Act of 1934, as amended:

Sec. 310(a). The station license required hereby shall not be granted to or held by—

(1) Any alien or the representative of an alien;
(2) Any foreign government or the representative thereof;
(3) Any corporation organized under the laws of any foreign government;
(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;
(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

Sec. 310(b). The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer or control of any corporation holding such license, to any person, unless the Commission shall, after secur-

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ing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

Section 311 of the Communications Act of 1934, as amended:

Sec. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation.

Section 313 of the Communications Act of 1934, as amended:

Sec. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings

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brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: Provided, however, That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

Section 402(b)(1) of the Communicaitons Act of 1934, as amended:

Sec. 402(b). An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of this District of Columbia in any of the following causes:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

Section 402(e) of the Communications Act of 1934, as amended:

Sec. 402(e). At the earliest convenient time the Court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: Provided, however, That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by sub-

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stantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended by appellant, by the Commission, or by any interested party intervening in the appeal.

Section 405 of the Communications Act of 1934, as amended:

Sec. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: Provided, however, That in the case of a decision, order, or requirement made under title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

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Section 5(a) of the Administrative Procedure Act:

> Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court and (6) the certification of employee representatives—
>
> (a) Notice—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

Section 10(e) of the Administrative Procedure Act:

> Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (e) Scope of Review—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

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(2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

RULES INVOLVED

The Sections of the Rules and Regulations of the Federal Communications Commission which are involved on this appeal are:

Sec. 1.321. Application for voluntary assignment or transfer of control; broadcast—(a) Applications for consent to the assignment of a construction permit or license for an AM, FM, television or other broadcast station or for consent to the transfer of control of a corporation holding such a construction permit or license shall be filed with the Commission on FCC Form No. 314 (Assignment of License) or FCC Form No. 315 (Transfer of Control). Each application shall be accompanied by a copy of a proposed notice in a form prescribed by the Commission which notice the licensee or permittee shall cause to be published at least twice a week for the 3 weeks immediately following the filing of such application in a daily newspaper of general circulation published in the community in which the station is located. The notice shall state the terms and conditions of the proposed assignment or transfer, the name of the proposed assignee or transferee, and, further, that any other person desiring to purchase the facilities upon the same terms and conditions may file an application to this effect with the Federal Communications Commission within 60 days from the date of the first publica-

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tion of the notice, which date shall be expressly set forth therein. Upon receipt of the application, the Commission itself will issue a similar public notice stating the terms and conditions of the proposed sale and stating that others may file competing applications for the same facilities upon the same terms and conditions.

(b) No action on any such application will be taken by the Commission for a period of 60 days from the date of first publication, during which time any person desiring to purchase the facilities upon the same terms and conditions may file a competing application. In the case of such competing application, it shall be necessary for the applicant to execute only so much of the application form as relates to the proposed assignee or transferee—F. C. C. Form No. 314, part II, and Form No. 315, part III.

(c) If no competing application is filed during this 60-day period, the Commission will consider the original application upon its merits and will grant it if it appears from an examination of the application and supporting data that public interest will be served thereby; otherwise it will be designated for hearing. If, during such 60-day period, any other application is filed, all such applications will then be considered simultaneously upon their merits, and if, upon such consideration, it appears that the proposed assignee or transferee selected by the licensee is the best qualified and that the transfer would otherwise be in the public interest, the Commission will grant the original application without a hearing. If the Commission is unable to make such a determination upon consideration of the several applications, the original application and all competing applications will be designated for hearing, to be heard in a consolidated proceeding, to determine among other things which of the applicants is best qualified to operate the station in the public interest.

(d) If, at the conclusion of such hearing, the Commission is of the opinion that the proposed assignee or transferee selected by the licensee is the best quali-

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fied and that the transfer is otherwise in the public interest an order will be entered granting the original application. However, if the Commission is of the opinion that one of the other applicants is the best qualified and that a transfer is otherwise in the public interest, an order will be entered denying the original application and stating that the Commission's consent to an assignment of the license or construction permit or to the transfer of control of the corporate licensee or permittee to such competing applicant will be given provided the licensee or permittee and such competing applicant enter into and file with the Commission within 30 days from the date of such order a contract for the assignment of the license or construction permit, or the transfer of control of the licensee or permittee, to such competing applicant upon the same terms and conditions as stated in the original application or upon such other terms and conditions as the parties may agree upon and which new terms and conditions the Commission shall find to be in the public interest.

Sec. 1.390. Petitions for reconsideration or for rehearing.—

(b) Where an application has been granted or denied after hearing, petitions for rehearing may be filed within 20 days after public notice is given of the Commission's action in granting or denying the application. Petitions for rehearing by persons not parties to the Commission's hearing will not be granted unless good cause is shown as to why it was not possible for such person to participate earlier in the Commission's proceeding.

(c) Petitions for reconsideration or rehearing filed under this section may request (1) reconsideration, either in cases decided after hearing or in cases of applications granted without hearing; (2) reargument; (3) reopening of the proceeding; (4) amendment of any findings; or (5) such other relief as may be appropriate. Such petition shall state specifically the form of relief sought and, subject to this requirement, may contain alternative requests. Each such petition shall state with particularity in what respect the decision, order or requirement or any matter determined therein

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is claimed to be unjust, unwarranted, or erroneous, and with respect to any finding of fact must specify the pages of record relied on. Where the petition is based upon a claim of newly discovered evidence, it must be accompanied by a verified statement of the facts relied upon, together with the facts relied on to show that the petitioner, with due diligence, could not have known or discovered such facts at the time of the hearing.

Section 1.196(a) of former Rules of Practice and Procedure:

Sec. 1.196. Notice of hearing under part I of title III.—In cases arising under part I of title III of the Act notice of applications received and action thereon shall be given in the following manner:

(a) By publishing the notice of hearing in the Federal Register not less than 30 days in advance of the hearing date.

Section 1.803 of present Rules and Regulations:

Sec. 1.803. Notice of hearing.—Reasonable notice of hearing will be given to all parties to a proceeding. Such notice shall include:

(a) A statement as to the time, place and nature of the hearing. Where the time and place cannot be designated in the initial notice, the notice will indicate that the time and place will be designated by subsequent notice.

(b) A statement as to the legal authority under which the hearing is to be held.

(c) A statement of the matters of fact and law involved in the hearing.

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APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.
Docket No. 6611
File No. B2-R-715

In re Application of
CHARLESTON BROADCASTING
COMPANY (WCHS)
Charleston, West Virginia
For renewal of license

DECISION

BY THE COMMISSION: (Commissioner Hyde not participating; Commissioners Durr and Jones dissenting)

1. These proceedings are upon an application of the Charleston Broadcasting Company, Charleston, West Virginia, for renewal of license of its Station WCHS, Charleston, West Virginia, for the period beginning June 1, 1944. The said application was designated for hearing by the Commission upon issues designed to determine, in substance, full information concerning the nature and extent of any interest that the applicant or its stockholders may have had in other broadcasting stations, particularly Station WGKV, Charleston, West Virginia, licensed to the Kanawha Valley Broadcasting Company; whether any such interests were reported to the Commission as required by the Commission's Rules and Regulations; and whether the statements and representations made to the Commission from time to time by or on behalf of the applicant or its stockholders have fully and accurately reflected the facts concerning such other interests.

2. After some delay due primarily to the unavailability of Mr. John A. Kennedy, principal stockholder in the applicant corporation and at the time of the hearing on active military duty, hearings in this matter were held on April

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9 and 17, 1945, and October 15 and 31, 1945, before a presiding officer duly appointed to preside in this case. Proposed findings have been filed by the applicant herein and have been duly considered in our findings and conclusions set forth below.

FINDINGS OF FACT

3. The Charleston Broadcasting Company is a West Virginia Corporation and the licensee of Station WCHS, Charleston, West Virginia, and Station WBLK, Clarksburg, West Virginia. Mr. John A. Kennedy, President of the Corporation, and his wife own approximately 84% of its outstanding stock. Mr. Kennedy's radio interests also include the Ohio Valley Broadcasting Corporation, licensee of Station WPAR, Parkersburg, West Virginia, a wholly owned subsidiary of the applicant herein, and Kennedy and his wife have a 48% stock interest in WSAZ, Inc., licensee of Station WSAZ, Huntington, West Virginia. These four stations have been operated as the West Virginia network. The record before us presents the question whether for a period of time subsequent to the grant of a permit for construction of station WGKV, Charleston, West Virginia, the applicant herein, or Kennedy, also held any interest in the Kanawha Valley Broadcasting Company, licensee of Station WGKV, and whether, if any such interests were not reported, the failure to report them was under such circumstances as to warrant a denial of the instant application.

4. On July 13, 1938, a construction permit was issued to the Kanawha Valley Broadcasting Company, effective July 23, 1938, for the construction of Station WGKV, Charleston, West Virginia, to operate on the frequency 1500 kc—changed to 1490 kc in February 1941—unlimited time, with 100 watts power. At the time this permit for station WGKV was issued to the Kanawha Valley Broadcasting Company, a West Virginia corporation, all the stock in

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that company consisting of 250 shares of stock with a par value of $100 per share, was owned by Mr. William A. Carroll. This stock is referred to below as the WGKV stock. Mr. John A. Kennedy, President and principal stockholder in Charleston Broadcasting Company, licensee of Station WCHS, the only other broadcasting station then in Charleston, had opposed a grant of the construction permit for Station WGKV.

5. Some time in the fall of 1938 Mr. Kennedy conferred with Mr. George Porter, then Assistant General Counsel of the Commission, in charge of the Broadcast Division, and inquired whether or not it was necessary to report options for the purchase of stock in radio stations to the Commission. He was advised by Porter that it was not necessary to report such options. Shortly after this conference Kennedy approached Carroll and offered to construct Station WGKV and pay all the costs of such construction in return for 49% of the stock in the licensee of Station WGKV and an option to purchase an additional 11% of the stock for twenty-five hundred dollars ($2500). This proposal was accepted by Carroll and the option for purchase of 11% of the stock was issued to Kennedy shortly after construction began. On September 18, 1939, construction and installation of the broadcast facilities of Station WGKV was largely completed and several days later a certificate dated September 21, 1939, for 122 shares of the WGKV stock—49% of the total of such stock—was issued in the name of William A. Carroll who, under date of September 25, 1939, endorsed the stock certificate in blank and gave custody of the certificate to Kennedy. However, the corporate records continued to show ownership of such stock in the name of Carroll, since it was agreed between Carroll and Kennedy that Kennedy would not have the stock in his name or dispose of it or exercise any control over the affairs of Station WGKV until he had satisfied all of the debts he had incurred in the construction of the station.

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6. By November or December 1940 Kennedy had met all of these obligations with the exception of certain attorney's fees in the amount of $1500, or was in a position to meet all such obligations. Accordingly, for the first time, under the terms of his agreement with Carroll, Kennedy was in a position to exercise any control over the stock. He was also at that time financially able to exercise the option which he held for purchase of an additional 11% of the stock in WGKV. Accordingly, about that time he visited the office of the then Chairman of the Federal Communications Commission and after advising the Chairman that he, Kennedy, was in a position to obtain control of another local station, inquired whether the Commission might approve such a transfer of control. Kennedy testified that the Chairman expressed his strong belief that the Commission would not approve such a transfer of control. Thereupon Kennedy decided to sell his interest in Station WGKV, and during the period, December 1940—January 1941, he negotiated and concluded an agreement with one A. H. Crawford under which Crawford purchased the 49% interest of Kennedy in the WGKV stock and the option held by Kennedy for purchase of an additional 11% of such stock. Kennedy then took an option from Carroll for the remaining 40% of the stock in WGKV which was not involved in the sale to Crawford. He retained this 40% option until the beginning of 1942 when he sold that option to Worth Kramer, who also at the same time acquired the 11% option held by Crawford.

7. The first studios of WGKV were constructed in the WCHS auditorium. This agreement was made by Kennedy and Carroll in the interest of economy in operation of both stations. Mr. Kennedy testified that he had at no time exercised any control over the operation of Station WGKV, nor had any of his employees exercised or attempted to exercise such control. Mr. Kennedy did testify, however, that the first manager of Station WGKV was initially recommended to Mr. Carroll by him through Mr. Chernoff,

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his radio manager, and that he did negotiate a network contract for WGKV in conjunction with a contract which he was negotiating for his station in Clarksburg, West Virginia. The only testimony to the contrary is in the testimony of Mr. Sowers, the first manager of WGKV, who alleged that he was supplied with a list of prospective advertisers with instructions to "lay off" those indicated on the list and that he received instructions from Mr. Chernoff, manager of WCHS, and Miss Mercer, Mr. Kennedy's former secretary, who also mentioned the list and said that she exercised some supervision of WGKV's books. Miss Mercer, however, was discharged in 1941 and admitted that she was antagonized by Mr. Kennedy's conduct with respect to the employment of certain auditors to manage his office. However, Mr. Kennedy and Mr. Chernoff both emphatically denied that any control of radio WGKV was ever exercised or attempted either by themselves or any employees under their supervision. On this basis of this record, the Commission is unable to find that Mr. Kennedy exercised any control over Station WGKV as a stockholder or part owner.

8. During the period in 1938 when Carroll and Kennedy first reached their agreement through the end of 1940 the Charleston Broadcasting Company filed a number of statements with the Commission concerning its interests and those of its stockholders in other radio broadcasting stations. On each of these applications inquiry was made concerning other interests of the applicant in the field of radio broadcasting, and the answers to these questions in the applications filed by Charleston Broadcasting Company did not report any interest of Kennedy in Station WGKV.

CONCLUSIONS

1. Two serious questions confront us in this case. The first is whether Kennedy, principal stockholder in the applicant, possessed any interest in Station WGKV between the years 1938-1942 which the applicant was, under the

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Commission's regulations, required to report to the Commission. If he possessed any such interest, the second question is presented whether the failure of the applicant to report the interest of Kennedy resulted from inadvertence or misunderstanding, or whether it represented a design on the part of Kennedy to conceal his interest in Station WGKV.

2. As to the first question, we must hold that the interests involved should have been reported to the Commission. These interests were option contracts for the purchase of stock in a radio station and an executory contract for the purchase of stock in a radio station, under which title would not pass to the promissor until all conditions were performed or all consideration promised shoul dbe furnished. The applications filed by applicant on July 21, 1939, and November 29, 1939 (File No. B2-P-2334, B2-P-807, and B2-P-2739), which were for increase in power and other changes in conditions under which WCHS operation was authorized, contained the following question:

> "16. If applicant, or any partner, officer, member of the governing board, director, or principal stockholder has, or has had, any interest of any character whatever in, or any connection with, any of the following, there is submitted herewith a full and complete disclosure of the nature and extent of the interest in or connection with each. (If neither applicant, nor any of said parties, has, or has had, any such interest or connection, so state.)
>
> (a) . . .
>
> (b) Any radio broadcast station? ——————"

This question calls for "a full and complete disclosure of the nature and extent" of "any interest of any character whatever in, or any connection with . . . (b) any broadcast station." This question is certainly broad enough in scope to encompass an option agreement or an executory agreement for the purchase of stock in a broadcast station. The interests may not mature into full ownership because

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the option may not be exercised, or because the conditions of the executory contract may not be wholly fulfilled; nevertheless they are in fact substantial and valuable interests which may be exercised and which are entitled to legal protection.

3. Although the interests involved should have been reported by the applicant to the Commission, we are unable to find that the failure to report in this case was intentional and designed to conceal the facts from the Commission. We must find, rather, on the evidence before us, that the applicant acted in good faith. First, as to the option held by Kennedy for the purchase of 11% of the stock of Station WGKV, Kennedy testified that he has inquired of Mr. George Porter, then Assistant General Counsel in Charge of Broadcasting, whether an option for the purchase of stock of a broadcast station is the type of interest which must be reported to the Commission, that Mr. Porter informed him that such an interest need not be reported, and that as a result of this statement of Mr. Porter, he did not report the option because he believed that he was not required to do so. We must therefore conclude that while Kennedy acted erroneously in failing to have the opttion reported, he acted in good faith, believing that he was not required to do so.

4. As to the interest in 49% of the stock of WGKV, Kennedy testified that since all the consideration promised by him had not been furnished, and the condition upon which he was to assume ownership of the stock had thus not been fulfilled, he believed that he did not possess an interest in WGKV which he was required to report. For the reasons set out above in the findings, we are unable to conclude that Kennedy exercised any control over the affairs of Station WGKV, or otherwise acted in a manner inconsistent with the status which he described in his testimony. We, therefore, conclude that the applicant's failure to report the 49% interest of Kennedy in Station WGKV was

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the result of misunderstanding, and was without intent to conceal the facts from the Commission. Under these circumstances, we cannot conclude that a failure to observe the Commission's requirements resulting from misunderstanding reflects so adversely upon the applicant's qualifications to be a licensee as to require a denial of its application for renewal. Cf. *Buffalo Broadcasting Company,* Docket Nos. 5324 and 6325, adopted December 19, 1945.

5. IT IS, THEREFORE, ORDERED this 26th day of November, 1947, that application of Charleston Broadcasting Company BE AND IT IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION *
T. J. Slowie
Secretary

RELEASED: December 2, 1947

APPENDIX C

Memorandum of October 25, 1941, from David Deibler, Chief, Section 310(b) of the Law Department, Federal Communications Commission, to Mr. Lucien Hilmer, Assistant General Counsel in Charge of Broadcasting, Federal Communications Commission (pp. 5034-5037, Volume 39, Hearings Before the Select Committee To Investigate Federal Communications Commission, House of Representatives U. S. 78th Congress):

> "The attached letter from Attorney Joseph A. Hines, Boston, of September 26th is in furtherance of earlier correspondence in 1939 and 1941 in which we asked him to give us all the information he had. He still has not furnished such information as would enable us to take any possible constructive action. The question is whether we shall pursue this correspondence further with him.

* Commissioners Jones and Durr voted for denial of the application for renewal of license of Station WCHS, the latter by a short written opinion.

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"I have had Miss Marvick chart all the transfers with regard to WORL (formerly WBSO) since 1934 (see attached table). From Mr. Hines' letter, it would appear that he is talking about the matter of Crockwell, Eynon and Phelan transferring their stock after the Commission had granted an application for transfer of control (B1-TC-33) to them, which was in 1935. According to the table, you will note that on December 3, 1935, the Commission granted the application for transfer of control to them from Babson's Statistical Organization. Crockwell received 400 shares (40%) of the 1,000 shares outstanding; Eynon and Phelan each received 300 shares (together 60%) of the outstanding stock. On July 29, 1936, under an amendment to the Articles, 1,000 new shares of Class B common voting stock were issued, half of which was issued to Robert Nordblom, a new stockholder. The remaining 500 shares were issued to Crockwell, Eynon and Phelan in the following respective amounts: 200, 150, and 150 shares. At the same time, the former outstanding common voting stock was converted into Class A preferred non-voting. The effect of this amendment was to give the three individuals 50% of the voting stock rather than 100%. Technically, there resulted a divestment of control over the corporation by the three parties named.

"Thereafter, on March 25, 1937, Eynon and Phelan each transferred all of their 150 shares of voting stock and Nordblom transferred 100 of his 500 shares of voting stock to Harold Lafount, well known representative of Arde Bulova. Thereafter, on September 30, 1938, Crockwell transferred an additional 200 shares (of his 400 remaining shares) of voting stock to Sanford Cohen. After these transfers of March 25, 1937 and September 30, 1938, the voting stock was held as follows:

"Lafount	400 shares
"Sanford Cohen	200 shares
"Nordblom	400 shares
Total	1,000 shares

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"Thus, Crockwell, Eynon, and Phelan, to whom the transfer was made in 1935, held no voting stock whatsoever.

"According to the records, the information with respect to these stock transfers, etc., was reported promptly, as required by Section 43.1 of the Commission's rules. In view of the fact that there has been no attempt to mislead the Commission, and that the transfers took place in 1936 and 1937, I see no purpose to be served at this time by presenting the matter to the Commission in connection with the station's application for renewal of license. I recommend, however, that the facts be borne in mind and to this end placed in the folder of WORL, to be considered in connection with whatever rules on duplicate ownership may be adopted by the Commission pursuant to Order 84 of August 5, 1941.

"David H. Deibler,
"Chief, Section 310(b), Law Department."

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APPENDIX D

In the Matter of Revocation of Construction Permit of television station WTVJ,
Miami, Florida
Docket No. 9149
and
Application for Consent to Transfer of Control of Southern Radio & Television Equipment Company, permittee of television station WTVJ
Miami, Florida
Docket No. 9114
File No. BTC-636

DECISION

By Paul A. Walker, Commissioner

Preliminary Statement—Docket No. 9149 (Revocation Proceeding)

1. On January 10, 1947, Southern Radio and Television Equipment Company (hereinafter referred to as Southern) filed an application (File No. BPCT-183) for permit to construct a new television station in Miami, Florida, to be operated on Channel No. 4. The application was granted without hearing on March 12, 1947 and the permittee was assigned the call letters WTVJ. Thereafter, an investigation indicated that Southern, in its application and in other documents filed in connection therewith, concealed from the Commission material facts relative to its ownership and financial status and, in addition, made affirmative misrepresentations to the Commission.

2. On the basis of the information developed in the investigation, on July 29, 1948 the Commission, pursuant to Section 3.12(a) of the Communications Act of 1934, as amended, issued an order revoking Southern's construction

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permit.[1] Pursuant to the provisions of that section, and in accordance with Section 1.402 of the Commission's Rules and Regulations, the permittee requested a hearing on the order of revocation. The hearing was held in Miami, Florida, from October 25, 1948 through October 27, 1948. The record also includes the testimony by deposition of a Commission witness which was taken in New York on November 15, 1948.

PRELIMINARY STATEMENT—DOCKET NO. 9114 (TRANSFER OF CONTROL)

3. The above-entitled application (BTC-636, Docket No. 9114) for consent to the transfer of control of Southern to Wolfson-Meyer Theatre Enterprises, Inc., was filed on

[1] The findings made in the Order of Revocation are as follows :

"IT APPEARING, That the Commission, on March 12, 1947, granted the application (BPCT-183) of the said Southern Radio and Television Equipment Company for construction permit for a new television station (WTVJ) on Channel 4, Miami, Florida, said grant being made without hearing and on the basis of representations made by applicant in its application to the effect that, among other things, stockholders Venn, Nelson and Claughton would finance applicant, that for that purpose applicant had available for deposit to its account, upon grant of the application, bank checks of the aforesaid stockholders in the total amount of $214,000, and that stockholder Venn, by reason of his ownership of a majority of the voting stock would control applicant; and

"IT FURTHER APPEARING, Upon examination of the information and documents obtained in the aforesaid investigation, that the above checks in the amount of $214,000 were never deposited to permittee's account after grant, that in fact permittee has never had such an account, that stockholder Claughton, about or during May 1947, withdrew from permittee and upon withdrawal had returned to him his checks in the total amount of $213,660, that about or during May 1947 the aforesaid Venn relinquished his control over permittee to Wolfson-Meyer Theatre Enterprises, Inc., Miami, Florida, and finally, that the aforesaid Southern Radio and Television Equipment Company, despite the above changes in its financing and control, forwarded to the Commission on July 6, 1948, a statement (Commission Form 323), dated as of December 31, 1947, to the effect that the same ownership and financing of permittee obtained as did at the time of filing of its original application for construction permit; and

"IT FURTHER APPEARING, That Southern Radio and Television Equipment Company knowingly concealed from the Commission material facts relative to its ownership and financial status and has, in addition, made affirmative misrepresentations of facts to the Commission."

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April 19, 1948. On October 15, 1948, at the request of the parties to this application, the Commission designated the application for hearing in a consolidated proceeding with the hearing on the revocation order. The order of consolidation specified separate issues on which the transfer application was to be heard.[2]

REPRESENTATIONS MADE IN THE APPLICATION FOR CONSTRUCTION PERMIT

4. The application for construction permit was made a part of the hearing record by reference. It is considered necessary to set forth certain representations therein made, which are pertinent to the Commission's order of revocation. It was represented that the original capital structure of the corporation provided for an issue of 50 shares of common stock (par value $10.00, 1 vote per share), to be held 66% (33/50) by R. G. Venn, 32% by Edward N. Claughton, and a single qualifying share by the company's attorney Edward J. Nelson; that Venn was the President and director, Claughton, Vice-President and director, and

[2] These issues are as follows:

"1. To determine whether the proposed transferee is legally, financially, technically and otherwise qualified to own or control and to operate station WTVJ, Miami, Florida.

"2. To determine the full contract arrangements or agreement of sale either presently made or to be made by the proposed transferor with the transferee, including the price and the manner of payment and the properties to be receivd therefor.

"3. To secure full information as to the plans of the proposed transferee for staffing the station, its plans with respect to the station's programming, and all other plans or arrangements for the operation of the station.

"4. To determine whether the construction permit for station WTVJ, granted to Southern Radio and Television Equipment Company, or the rights and responsibilities incident thereto, have been transferred, assigned, or disposed of, directly, or indirectly, without the consent of the Commission to the proposed transferee herein, and in contravention of the provisions of the Communications Act of 1934, as amended, and more particularly Sections 319(b) thereof.

"5. To determine whether all contracts, obligations, undertakings and agreements which have been entered into by the proposed transferor and by the proposed transferor with proposed transferee relative to the ownership, operation, financing and control of Southern Radio and Television Equipment Company have been reported to the Commission as is required by its Rules and Regulations.

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Nelson, Secretary-Treasurer and director; that the cash on hand as of December 31, 1946 was $500.00, consisting of three (3) checks received from the stockholders in payment for their common stock; that to finance the construction and initial operation of the station the applicant held two checks drawn by Claughton in the amount of $163,500 and $50,000, respectively;[3] that Claughton was to receive 21,350 shares of preferred non-voting stock (par value $10.00 per share) and that he had agreed to purchase 18,650 additional shares of such preferred stock if and when the corporation should need further financing; that although the issuance of preferred stock was not authorized by the charter it would be amended to provide therefor; that the checks totaling $213,500 and the three checks in the amount of $500 would be deposited to a new account in the name of the corporation on March 1, 1947, or upon receipt of the construction permit; that Claughton's participation was limited solely to the furnishing of funds; and that he was to have nothing to do with the management of the corporation, which was to be left to Venn.

FINDINGS OF FACT (DOCKET NO. 9149, REVOCATION MATTER)

5. Southern was organized and its application filed through the efforts of Robert G. Venn. Neither Venn nor Nelson had issued checks, as claimed, for the purchase of their common stock. Mr. Venn testified that he had not issued his check ($330), for by the time the application was filed he had already expended considerably more than this amount on behalf of the corporation. Mr. Nelson admitted that he had not issued a check as represented, but explained that the other checks were held in the office of his law firm, for Southern, and he was in a position to issue his check

[3] While Claughton's balance sheet submitted as an amendment to the application, on February 3, 1947, showed only cash on hand in the amount of $60,000, it was evident that he had more than sufficient assets available to meet his commitments.

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($10) on "two seconds notice." Claughton's two checks were postdated to March 1, 1947 but the Commission was not so informed. On March 12, 1947 the application of Southern was granted, and on April 11, 1947 a telegram was sent to the corporation informing it of this action. On April 30, 1947 a construction permit was mailed to the permittee. Claughton's checks were not deposited upon receipt of the construction permit nor was the charter amended to provide for the issuance of preferred stock. On or about March 1, 1947 he had orally requested Southern to withhold deposit thereof and had indicated his desire to withdraw from the corporation.

6. On June 4, 1947 Claughton advised Southern by letter that it was his desire to withdraw his subscription to the 16 shares of common and 40,000 shares of preferred stock and to have no further interest in Southern financially or otherwise. This letter was prepared by Southern's attorney, at Venn's request, and it was Venn who requested Claughton to sign it. In the letter he stated "if the board of directors of the corporation act favorably upon my offer of withdrawal, I shall, of course, expect the corporation to redeliver to me the two (2) checks above-mentioned. Further, if the board of directors of the corporation takes such affirmative action upon my request I desire to tender my resignation as vice-president of the corporation effective immediately." He asked that the matter be taken up at the next meeting of the board of directors. It was not considered by the board until a much later date as is hereinafter stated. Southern did not at any time inform the Commission of these facts. Venn testified that the Commission was not so informed because Southern had no intention of releasing Claughton from his obligations until other financial support could be arranged.

7. When Venn first learned that Claughton was not interested in financing Southern, which was before its application had been granted, he immediately began seek-

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ing other financial assistance. In May of 1947 he discussed with Mr. Wolfson of Wolfson-Meyer Theatre Enterprises, Inc. (hereinafter referred to as Wometco) the possibility of his company financing Southern's venture. When Venn discussed this matter with Wolfson, he (Venn) was employed by Lincoln Operating Company, a subsidiary of Wometco. He had been employed by this company, shortly after Southern filed its application, to assist it in its efforts to obtain a new AM station at Miami. During his period of employment with Lincoln, Venn made trips with employees of Wometco for the purpose of keeping Mr. Wolfson informed on the progress of the art of television. Wometco paid his expenses for these trips but he received no salary. When Lincoln Operating Company acquired a 9% interest in Sun Coast Broadcasting Corporation, which eventually was granted a construction permit for a new AM station in Miami under the call letter WMIE, Venn assumed the position of General Manager of the station and was so employed as of the date of this hearing.

8. Negotiations between Venn and Wometco on the question of financing Southern took place on numerous occasions between May of 1947 and approximately February or March of 1948 when Wometco entered into a contract to purchase Southern. According to Wolfson, he was interested in acquiring control of Southern but was unwilling to do so unless Claughton could be eliminated as a stockholder. Venn agreed to assure Claughton's withdrawal if Wometco finally decided to invest in Southern. This was done by having Claughton sign the letter of June 4, 1947 addressed to Southern as above stated. On March 25, 1948 Southern finally acted upon this letter, accepted Claughton's resignation and returned his two checks. On that date Claughton signed a release acknowledging return of his checks, and he testified that this was the date of their return. The negotiations extended over a lengthy period of time because of the many technical and legal details to be resolved. These problems as reflected by the record

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were that Wolfson had to convince the stockholders of Wometco that they should go into this project upon a substantial scale; that a determination had to be made of certain income tax problems which might otherwise have inhibited the proper operation of the company; that the extent of Venn's participation had to be determined; that a management contract had to be negotiated with Venn; and that it was necessary to draft an adequate agreement which was satisfactory to all of the parties.

9. Venn received $300 monthly from Wometco for his expenses incurred on behalf of Southern's venture. These payments commenced around May of 1947 and ceased on December 31, 1947. From February 5, 1948 to September 30, 1948 Wometco advanced a total of $97,657.66 to Southern for the purchase of equipment and payroll expenditures. For this advance Southern issued to Wometco five (5) demand notes, bearing 5% interest. In June of 1948 Southern opened a bank account in the First National Bank of Miami, Florida, and funds advanced by Wometco were deposited therein. Venn is the only person who may draw checks on this account, but checks written by him must be countersigned by an employee of Wometco who is loaned to Southern to keep its financial records. The Commission at no time was informed of this arrangement. Wolfson testified that Wometco's reasons for advancing this money to Southern were: "* * * in order for them to have sufficient funds to meet their commitments, both to the FCC as to getting television equipment to the public in the public interest and getting television for the Fall of 1948 for Miami; our desire to assist them and to hope that we would be permitted to take over control of this company by the FCC; we advanced them the money * * * that were necessary, as a loan, to proceed to purchase this equipment, to proceed to do the construction that was necessary, and to proceed to try to bring television to the Greater Miami area."

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As of the date of this hearing, Wometco had committed itself in the amount of $300,000 for equipment, etc., necessary to complete construction of the station. According to Mr. Wolfson's testimony, Wometco never intended nor has it ever attempted to assume control of Southern. He stated that Venn received assistance in connection with business and financial matters from Wometco, but he has always had the final authority with respect to matters relating to the construction of the television station and management of Southern.

10. On October 13, 1947 Southern filed its application BMPCT-121 requesting additional time within which to complete construction of the station. Venn answered in the negative a question in the application: "Have there been any changes in the information heretofore submitted by the applicant in the application for construction permit, any amendments thereto, or a modification thereto since filing?" On July 6, 1948 Southern submitted to the Commission its "Annual Ownership Report" (Form 323), purporting to reflect the ownership of Southern as of December 31, 1947. That report, made under oath, stated that Venn, Claughton and Nelson held the same stock and participated in the corporation in the same capacity as originally provided in the application for construction permit.

FINDINGS OF FACT (DOCKET NO. 9114, TRANFER APPLICATION)

11. Notice of the filing of the transfer application was duly published in accordance with the Commission's Rules and Regulations but no competing application was filed within the time specified by the Rules.

12. The proposed transferee, Wolfson-Meyer Theater Enterprises, Inc. is a Florida Corporation authorized to issue 250 shares of stock ($100 par value, equal voting) all of which has been issued. The officer's directors and stock-

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holders of the corporation, all of whom are residents of Miami, Florida, and U. S. citizens, are as follows:

Name		*Percentage of Stock Owned*
Mitchell Wolfson	President & Director	16%
Sidney Meyer	Vice President & Director	16.13/15%
Francis Wolfson	Director	2. 3/15%
Zenia Meyer	Treasurer & Director	3.14/15%
Francis Wolfson as Trustee		29. 6/15%
Mitchell Wolfson as Trustee		2. 6/15%
Sidney Meyer as Trustee		2. 6/15%
Zenia Meyer as Trustee		26.12/15%
Albert B. Bernstein	Secretary & Director	

The above trusts were created by the several members of the families for the benefit of their children. The trustees have full and unrestricted discretion in voting the trust stock and conducting the business affairs of the corporation. The stockholders have never been convicted of a crime and there are no outstanding judgments or decrees against them.

13. *Mitchell Wolfson,* the principal officer of Wometco, was born in Key West, Florida, and has resided in Miami continuously for the last 30 years. He has been and is now an officer or director in numerous civic and charitable organizations in the Miami area. He served three terms, a total of six years, as a City Commissioner of Miami Beach and then for a short time was Mayor, resigning that position to enter the military service in 1943. A number of outstanding civic leaders of Miami and Miami Beach appeared at the hearing and testified that Wolfson's reputation in those communities as to cooperation with civic, charitable and eleemosynary institutions is excellent, and that he is one of the communities outstanding citizens.

14. *Sidney Meyer* is a director or member of the following organizations: Board of Trustees of the Jackson Memorial Hospital; the Board of Directors of the Dade County Chapter of the Boy Scouts of America; the Board of Direc-

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tors of the Light House for the Blind; the Citizens Advisory Board of the University of Miami; and the Miami Beach Chamber of Commerce.

15. *Wolfson-Meyer Theatre Enterprises, Inc.* is engaged in the ownership operation and management of motion picture theatres and numerous affiliated enterprises confined to the greater Miami area. It owns 20% of the voting stock of Sun Coast Broadcasting Corporation, licensee of Station WMIE, Miami, Florida. There is an affiliated corporation known as the Wolfson-Meyer Charitable Foundation formed by the two families for the purpose of contributing to medical research, educational funds and various charitable and other eleemosynary works. All of the money in the fund, which has been in operation some eight years, is contributed by the families. Each year Wometco gives six scholarships to the University of Miami, four scholarships for white boys and girls and two scholarships to colored boys and girls. The winners of the scholarships are selected by the high schools on the basis of scholastic ability, character and economic need.

16. The transfer of control is to be executed by simple stock subscription. On March 22, 1948, the stockholders of Southern approved an amednment to its Articles of Incorporation which provides for the issuance of 1000 shares of Class A common stock (par value 9.50) and 333 shares of Class B common stock (par value 1.00). All of the stock has equal voting rights. The holders of Class A stock are required to lend $200 per share to the corporation repayable after twenty years with no interest payable during the first three years. Under a stock subscription agreement of March 1, 1948, Wometco subscribed to all of the Class A stock. The Class B stock was subscribed by Robert G. Venn 200 shares; Mitchell Wolfson 200 shares; Sidney Meyer 35 shares; Francis Wolfson 30 shares; Zenia Meyer 30 shares. Mitchell and Francis Wolfson, and Sidney and Zenia Meyer are husband and wife.

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17. Messrs. Claughton and Nelson are receiving no consideration for their stock relinquishment except the return of their investments. Mr. Venn is receiving no monetary consideration except return of sums advanced by him and is changing his status from a majority to a minority stockholder in consideration of having a new and financially responsible stockholder to take the place of the financier who desires to withdraw. In addition he has entered into a contractual agreement to manage the television station.

18. The program plans originally submitted by the permittee have been approved by the transferee, but it intends to take advantage of new developments so as to expand and improve the original showing. A program is to be developed in cooperation with the State agricultural experimental station to show the farmers' particular methods of fighting insects, improving crops, and preventing blights and viruses. The station will be used in full cooperation with Miami University and the permittee will take the initiative in the planning and development of programs. The permittee has already paid $1,800 to the University for an agreement for the broadcasting by television of the University's athletic events. Particular emphasis will be placed upon the development of local talent, for the executives of the company have had extensive experience in that field in connection with their motion-picture-theatre operation.

19. Special training has been given the proposed program manager of the station. He has had a course of instruction in television techniques with the General Electric television station at Schenectady, New York, and has studied television production at New York and elsewhere. Other employees, who had been assembled by Southern during the construction of the television station are also available.

20. The current assets of Wometco are $319,770, in addition to its share of cash and negotiable securities in

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the hands of affiliated companies, amounting to $454,990. The transferor understands that the television station may lose money, but is prepared to insure its operation.

CONCLUSIONS

1. The questions to be decided, as we see them, are as follows: (1) Did the failure of Southern to open a bank account and deposit Claughton's checks as represented in its application, constitute a misrepresentation to the Commission; (2) Did the fact that Claughton, prior to March 1, 1947 orally, and on June 4, 1947 in writing, indicated his desires to resign as vice-president and to be relieved of his financial obligations to Southern, actually constitute a change in the corporate and financial structure of Southern which should have been reported both in its application (File No. BMPCT-121) and in its "Annual Ownership Report", showing the corporate structure of Southern as of December 31, 1947; and (3) Did Southern actually relinquish control to Wolfson-Meyer Theatre Enterprises, Inc. at any time?

2. It appears clear from the evidence that Southern's application was filed in good faith and that the directors of Southern intended to establish a bank account in Southern's name in which Claughton's checks were to be deposited either on March 1, 1947, or when the construction permit was granted. The fact that later events brought about changes in fiscal plans does not render deceitful or intentionally misleading those plans first contemplated. We, therefore, conclude that, to this extent, Southern made no misrepresentations to the Commission in its original application.

3. From the evidence in this record we must find that a reasonable doubt existed as to Claughton's actual status in Southern prior to March 25, 1948. He testified that prior to March 1, 1947, he had orally requested that his checks not be deposited and had expressed his interest in with-

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drawing from Southern. He further stated that as of that date he "literally and actually" considered himself no longer associated with Southern. In the absence of a legal ruling on Claughton's obligation to Southern it is doubtful whether the transaction up to that point justified such an assumption by Claughton. He was aware that Southern held his checks which could have been negotiated if Southern had elected to do so. The record does not show that he took any action to prevent the use of the checks, although they were not returned to him within a reasonable time after his letter of June 4, 1947. This letter evidences Claughton's recognition of his actual status in Southern and is inconsistent with his testimony that he considered himself "literally and actually" no longer associated with Southern after March 1, 1947. The record does show that Messrs. Venn and Wolfson considered Claughton to be associated with Southern after March 1, 1947. It was for this reason that Venn had Claughton sign the letter of June 4, 1947. They both considered this letter to be the means by which Mr. Claughton could be separated from Southern, if and when Wometco finally agreed to purchase control thereof. There can be no doubt that, as of June 4, 1947, Wometco intended to purchase a financial interest in Southern, when certain arrangements, essential to the purchase, were concluded. There is also no doubt that Venn intended to return Claughton's checks, when a definite contract was signed by the parties to the transfer transaction. We are of the opinion that this changed circumstance, which affected the entire financial structure of Southern, was one that should have been reported to the Commission, within a reasonable time after June 4, 1947. However, the record does show that Venn did not deliberately conceal this matter from the Commission. Although it is considered that a more prudent person would have reported these changed circumstances to the Commission, we do not feel that Southern was so remiss in this matter as to warrant affirmation of the Commission's order revoking its construction permit.

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4. The evidence shows that the relationship of Southern and Wometco from May, 1947 through March, 1948 was closer than that which ordinarily exists between lender and borrower or a proposed transferor and transferee. We refer specifically to the fact that Wometco had paid Venn in connection with his management of Southern from May 1947 to December 31, 1947 and commencing in February 1948 had advanced large sums of money for the construction of the television station. The record is not clear as to why Venn was paid by Wometco as mentioned, but there is no evidence that this had any effect on Venn's control of Southern. Mr. Wolfson's testimony is clear as to why the advances commencing in February were made, and we have no doubt concerning the reasonableness of his statements. The record shows that in February or March, 1948, approximately one month after these advances commenced, Wometco did enter into a contractual agreement to purchase control of Southern and that on April 19, 1948, the application for consent to the transfer of control was filed with the Commission. We do not consider that the evidence up to this point in the transactions supports a finding that Wometco assumed unauthorized control of Southern.

5. The undisputed facts in this record show that when Southern opened a bank account in June of 1948, Venn was unable to cash any checks without the countersignature of a Wometco employee. The Commission was not informed of this arrangement and, therefore, had no opportunity to determine beforehand, whether it constituted a transfer of control. Through its employee, Wometco was in a position to veto Mr. Venn's power of fiscal control of Southern. It is believed that such an arrangement could result in a transfer of control. We feel that, in such a case, the question of transfer must be resolved by examining the various facts concerning the arrangment together with any contracts that may exist in connection therewith. We, therefore, believe that this arrangement, and the reasons

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therefor, should have been reported to the Commission for a determination of the transfer question, before it went into effect. However, Wometco did not exercise this power over Southern except formally to approve expenditures for the construction of the station. In addition, the record discloses that the president of Wometco did not consider this arrangement to be an incident of control. In view of the foregoing we conclude that there was no actual transfer of control of Southern to Wometco.

6. As will be recalled, Southern, in its application, represented that it had cash on hand in the amount of $500, consisting of three (3) checks received from the stockholders as payment for their common stock. Messrs. Veen and Nelson testified that they had not issued checks for their stock, as represented. There can be no doubt that this constituted a misrepresentation to the Commission. In their testimony, these men gave rather nebulous reasons for their obvious lack of candor in this matter. However, in view of the circumstances surrounding this matter, we do not feel justified in concluding that this was a deliberate attempt to conceal facts bearing upon the qualifications of the applicant. It would seem unreasonable for the Commission to sustain its order of revocation solely on this ground.

7. While it is considered that neither Wometco nor Venn acted prudently in this matter, we do not feel, after a careful consideration of all of the facts, that the evidence in this case justifies the affirmation of the Commission's order revoking the construction permit of Southern Radio and Television Equipment Company (WTVJ). Accordingly, it is ordered that the order of revocation in this matter be, and it is hereby, revoked.

8. On the basis of the facts contained herein, we conclude that the transferee, Wolfson-Meyer Theatre Enterprises, Inc. is legally, technically, financially and otherwise qualified to operate Station WTVJ; that it proposes a pro-

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gram service designed to meet the needs of the community; and that a grant of the application for consent to the transfer of control of Southern Radio and Television Equipment Company thereto would be in the public interest. Accordingly, it is ordered, that this application be, and it is hereby, granted.

9. Dated at the offices of the Federal Communications Commission this 5th day of January, 1949.

PAUL A. WALKER
Commissioner

On February 4, 1949, the following notice was released by the Commission:

"Notice is hereby given that no appeals have been taken from the Initial Decision in the above entitled proceeding, dated January 5, 1949, within the required time, and that pursuant to 8(a) of the Administrative Procedure Act such Initial Decision is final as of January 26, 1949."

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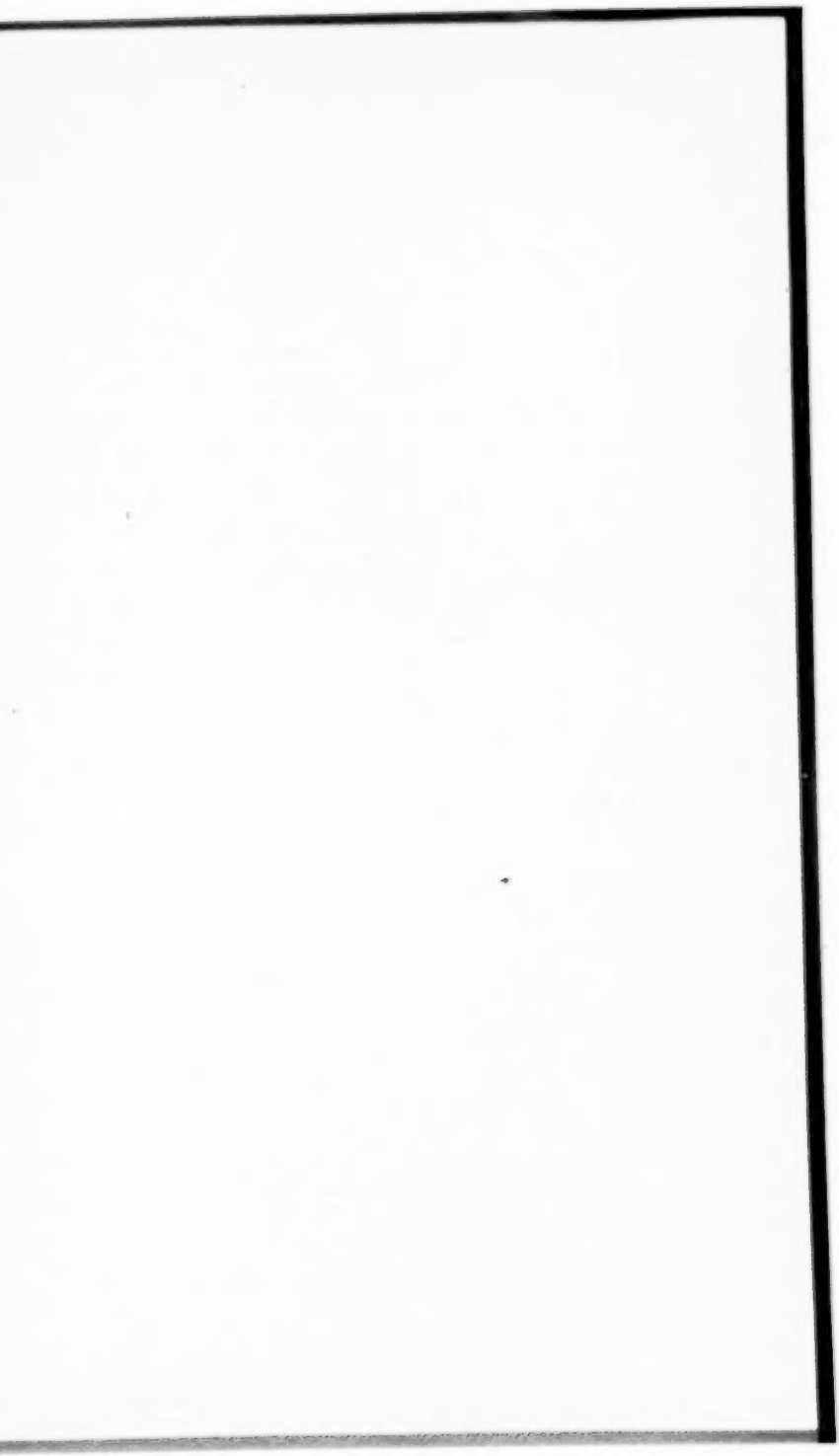

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